No. 92-612

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

LAWRENCE MACKIN, ET AL.,
Petitioners,
v.
CITY OF BOSTON, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Question Presented.

Did the Court of Appeals for the First Circuit improperly apply the holdings of the United States Supreme Court enunciated in *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989) and *United States* v. *Paradise*, 480 U.S. 149 (1987) when finding that the hiring practices under a 1974 consent decree by the city of Boston were constitutionally permissible when providing race-based relief over higher-scoring white persons?

List of Parties.

The parties to the proceedings below and petitioners on this action are Lawrence Mackin, Allan D. Blair, Mark S. Blair, Thomas J. Blake, William H. Buckley, Paul E. Burke, William J. Culleton, Robert F. Curley, Michael P. Dillon, John E. Doherty, Paul M. Finn, Richard L. Fulham, Edward J. Garvey, Patrick T. Gillespie, Thomas A. Granara, Edward J. Haley, Scott M. Hoffman, Richard A. Howard, Raymond C. Johnson, Sean F. Kelley, Thomas T. Kelley, John Kilroe, James J. Lonergan, Charles P. Leahy, Daniel F. MacDonald, Paul D. MacDonald, Thomas W. Martin, James J. McAlpine, Carl G. Nash, William J. O'Brien, William B. O'Sullivan, Richard J. Potter, Joseph D. Scott, Patrick J. Travers, Serge Verbitski, and the respondents are City of Boston, Raymond L. Flynn, Mayor of the City of Boston, David A. Haley, Personnel Administrator for the Department of Personnel Administration, Leo D. Stapleton, Fire Commissioner of the City of Boston, and the defendant intervenors are NAACP and United States of America.

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No. .

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The petitioners, Lawrence Mackin, et al., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in this case.

Opinions Below.

The opinion of the United States Court of Appeals for the First Circuit (Appendix A, at page 1a) is reported at 969 F.2d 1273 (1st Cir. 1992). The opinion of the United States District Court for the District of Massachusetts (Appendix B, at page 16a) is unreported.

Jurisdiction.

The decision below entered on the docket on July 6, 1992. This is a petition from a decision of the United States Court of Appeals for the First Circuit, affirming the judgment of the United States District Court for the District of Massachusetts declaring that the City of Boston, in making appointments to the Boston Fire Department, has not come into compliance with the terms of a 1974 judicial decree and that a compelling reason exists for providing race-based relief. In their complaint, and throughout the proceedings in the federal courts, the petitioners drew into question the validity of the decree on the ground that the City of Boston had satisfied the terms of the 1974 decree and that continued enforcement of the decree violated the petitioners' rights to equal protection under the Fourteenth Amendment to the United States Constitution and Title VII. Judgment was entered by the United States District Court for the District of Massachusetts on October 28, 1991. On November 13, 1991, the petitioners filed a notice of appeal to the United States Court of Appeals for the First Circuit. On July 6, 1992, the United States Court of Appeals for the First Circuit issued its decision and entered judgment affirming the judgment of the federal courts below. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional Provision and Judicial Decrees Involved.

The Constitutional Provision involved is the Fourteenth Amendment to the Constitution of the United States. The pertinent text of this provision is set forth in Appendix D, at page 42a. This case also involves the judicial consent decrees of 1974 (Appendix C, at page 31a).

Statement of the Case.

This case arises from a civil action commenced by the petitioners in the United States District Court for the District of Massachusetts, seeking redress for the violation of the petitioners' rights under the equal protection clause of the Fourteenth Amendment to the United States Constitution. Specifically, the petitioners, 35 white candidates for the position of firefighter in the Boston Fire Department, sought in their complaint a declaration that the City of Boston had met the terms of the 1974 judicial decree mandating race-based relief in the employment of Boston firefighters and that continued enforcement of the decree discriminated against the petitioners on the basis of race. The petitioners further sought injunctive relief restraining the City of Boston from continuing its practice of appointing lower-scoring minorities to positions as Boston firefighters over higher-scoring white candidates (App. A. 1a). In December of 1990, the motion for injunctive relief was denied. In January of 1991, the petitioners filed a motion for summary judgment. In February of 1991, the respondents filed opposition to the petitioners' motion for summary judgment, and, immediately thereafter, filed cross motions for summary judgment. By a decision dated June 21, 1991, the district court allowed the respondents' motion for summary judgment (App. B. 20a-30a). Immediately thereafter the petitioners filed a motion of reconsideration which was denied (App. B. 18a-19a).

The facts giving rise to the commencement of the above action can be summarized briefly as follows: On December 7, 1987, thirty-five white males, the petitioners, took and passed the entrance examination for the position of Boston firefighter and passed with perfect scores of 100%. They were qualified for the position in all other respects. In the spring of 1988, when the Boston Fire Department requested an eligibility list of candidates from which to make appointments to the permanent position of Boston firefighter, the Department of Personnel Administration, allegedly relying on 1974 consent decrees mandating race-based relief in hiring, submitted an eligibility list which gave preferential treatment to blacks and Spanish-surnamed people who had scored lower on the examination than the petitioners. The petitioners allege that petitioners were bypassed for employment solely on the basis of race and that the City of Boston has come into compliance with the 1974 decree and should be exempt from it (App. A. 18a-30a).

Prior Proceedings.

In 1972, persons who were representative of black and Spanish-surnamed applicants for the position of firefighter brought suit against the Boston Fire Department and the Civil Service Commission for the Commonwealth of Massachusetts in the case of *Boston Chapter, NAACP, Inc.* v. *Beecher*, 371 F.Supp. 507 (D. Mass. 1974). The gravamen of their complaint was that based upon the fact that the City of Boston's minority population was 16% Black, 3% Spanish-surnamed, and that less than 1% of the Boston Fire Department's work force was composed of these two racial groups (hereafter minorities), the defendants were engaging in discriminatory hiring practices against minority applicants. *Id.* at 514.

The plaintiffs alleged that the defendants discriminated against them through the use of written tests and physical requirements that were not job related and had a discriminatory impact against minority candidates. The plaintiffs relied on statistical data to prove their case. *Id.* at 509-510.

At trial, the District Court found that the entrance examination was not job related and, based on the federal census figures, held that the test had a disproportionate racial impact against minority candidates. The Court ordered that preference be given to minorities to remedy past discrimination by the establishment of preferential eligibility lists by race. *Id.* at 513-520.

Thereafter, the defendants appealed. The First Circuit Court of Appeals affirmed the lower court's order and the establishment of preferential racial eligibility lists. The Court held that the lower court's decrees would remain in effect "[u]ntil the [fire] department attains sufficient minority firefighters to have a percentage on the force approximately equal to the percentage of minorities in the locality." *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017, 1027 (1st Cir. 1974). In addition, the Court held that "[W]e believe that our society is well served by taking into account color in the fashion used *and carefully limited in extent and duration* by the District Court. *Id.* at 1027 (emphasis added).

After the present litigation was filed in September of 1989, the Boston Fire Department continued to give preferential treatment to minority applicants, creating by November 13, 1990, an approximately 20.5% black composition of the Boston Fire Department. (App. B. 23a-24a).

Petitioners assert that even if, *arguendo*, the 1980 census is used, since Massachusetts law requires a person to be 19 years of age to qualify to take the examination for firefighter, the relevant comparison should be the racial composition of Boston's 19-and-over population. According to the 1980 cen-

sus figure the total minority population over 18 was 23.6% (App. B. 18a-19a).

In its decision of July 19, 1991, the United States District Court for the District of Massachusetts found that the City of Boston had not satisfied the terms of the 1974 consent decree and could not join the list of communities that had been exempted from it. The Court found that as of November 1, 1990, the Boston Fire Department was 20.3% black and 3.3.% Hispanic, for a total minority percentage of 23.6%, and that according to the 1980 federal census, Boston's black population was 22.4% and Boston's Hispanic population was 6.4%, for a total of 28.8%. (App. B. 23a-24a).

Reasons for Granting the Writ.

I. The Boston Fire Department Has Satisfied the Terms of the 1974 Decree.

Petitioners submit that the First Circuit Court of Appeals erred in ruling that the Boston Fire Department has not reached parity within the terms of the decree in *Boston Chapter, NAACP, Inc.* v. *Beecher*, 371 F.Supp. 507 (D. Mass. 1974).

In the District Court's Memorandum and Order dated June 21, 1991, on the parties' cross motions for summary judgment, the court ruled that the Boston Fire Department should not join the list of communities that have been exempted from the decree in the *NAACP* v. *Beecher* case. (App. B. 20a-24a). The court's decision was based on its finding that the population parity goal set by the courts refers to current population statistics at the time that a request for an exemption is made and not as of 1970 or 1974 as contended by the petitioner herein. Based on this finding, the court ruled that the Boston Fire Department has not reached parity within the terms of the decree, since 1980 Federal Census statistics showed that the

total minority population of the city of Boston was 28% and the Boston Fire Department was currently 23.6% minority. (App. B. 24a). The First Circuit Court of Appeals affirmed the district court. (App. A. 1a).

Petitioners submit that the correct determination on whether the goals of the court order in the *NAACP* v. *Beecher* case have been met depends, not upon the percentage of minorities in the total population of the city of Boston, but rather on the percentage of black and Spanish-surnamed persons in the local labor force. *See United Steelworkers of America* v. *Weber*, 443 U.S. 193, 197-199 (1979).

Since Massachusetts law (G.L. c. 31, § 58 App. E., 42a) requires a person to be nineteen years of age to qualify to take the Civil Service examination for firefighter, the relevant comparison, if the 1980 census data is used, should be the racial composition of the qualified population in the relevant labor market. *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 996-997 (1988); *Hazelwood School Dist.* v. *United States*, 433 U.S. 299, 308 (1977). According to the 1980 Federal Census, the percentage of the population of Boston over the age of eighteen which was black was 18.7% and the percentage over the age of eighteen which was of Spanish origin was 4.9%. The total minority percentage of the Boston population over age eighteen was 23.6% (App. B. 18a-19a).

Since the lower court found in its ruling that the Boston Fire Department was 23.6% minority, the Fire Department should be exempted from the *NAACP* v. *Beecher* decree. In fact, the Boston Fire Department should be exempted from giving preference to black candidates since the percentage of black firefighters within the Boston Fire Department has been higher than the percentage of the relevant black population since at least January 1, 1988 (App. B. 24a). It is clear that the *NAACP* v. *Beecher* decree's validity and the Boston Fire Department's exemption therefrom should depend on a com-

parison of the percentage of black firefighters in the Boston Fire Department with the percentage of blacks in the qualified labor force. *United Steelworkers of America* v. *Weber, supra; Watson* v. *Fort Worth Bank & Trust, supra.*

The petitioners, therefore, submit that the First Circuit Court of Appeals erred in its decision affirming the district court. The court should have entered an order that the Boston Fire Department should join the list of communities that have been exempted from the decree in *NAACP* v. *Beecher.* In addition, the petitioners submit that the First Circuit Court of Appeals should have ruled that the continued validity of the *NAACP* v. *Beecher* decree depends on a goal which compares the racial composition of the Boston Fire Department with the racial composition of the qualified population in the relevant labor market and not on a comparison of population figures of all minorities within the city of Boston and in the Boston Fire Department.

II. The Lower Court Committed an Error of Law When it Found a Compelling Reason Existed for Providing Race-Based Relief.

When reviewing a lower court's allowance of a motion for summary judgment the reviewing court must view the facts in the light most favorable to the party against whom summary judgment was granted. "In our appraisal of petitioners' claim we must accept his version of the facts since the District Court granted summary judgment against him." *Bishop* v. *Wood*, 426 U.S. 341 at 347 (1976) (footnote omitted).

When applying this well tested standard the following facts are presumed to be true: (1) the petitioners are all white males who attained a score of one hundred percent on the entrance examination for the position of firefighter in the Commonwealth of Massachusetts (App. A. 5a); (2) all of the petitioners were passed over for appointment to the Boston Fire Depart-

ment for lower scoring blacks and Spanish-surnamed persons because the plaintiffs are white (App. A. 5a); (3) the entrance examination was validated under EEOC guidelines as not having a discriminatory impact on minorities (App. B. 22a); (4) when the litigation was filed the available federal census indicated that the city of Boston had a black population 18.7% (App. B. 24a); (5) in November of 1990 20.3% of the BFD firefighters were black (App. B. 24a); (6) the original court decree mandated 16.3% of the BFD to be black and Spanish-surnamed (App. B. 24a); (7) Court decrees mandated that hiring preferences end upon the establishment of a non-discriminatory examination (App. B. 22a); (8) at no time since the establisment of the Court's decrees has any of the parties to it brought it to the attention of the court that the examination that has been administered discriminated against blacks or Spanish-surnamed persons (App. C. 31a); (9) thirty-three municipalities have been allowed to withdraw from the court decree since 1975 (App. A. 5a).

When applying these facts to the instant litigation it is clear that the lower court committed an error of law by affirming the entry of summary judgment in favor of the respondents. In the lower court's decision the court relied upon a federal census that was taken in the year 1990, and totally ignored the census that was outstanding at the time the litigation was filed or the 1980 census (App. B. 18a-19a). On the plaintiffs' request for reconsideration the district court stated: "Since the most relevant comparison to November 1990 Boston Fire Department statistics is 1990 population figures, if any 18 [years] and over statistics are to be used, they would be taken from the 1990 census. According to those statistics the Boston Fire Department still has not reached parity unde the *Beecher* decree." (App. B. 18a-19a).

Indubitably, race-based remedies to alleviate past discrimination are subject to some level of elevated scrutiny to pass

muster under the Equal Protection Clause. *United States* v. *Paradise*, 480 U.S. 149, 166 n.17, 107 S.Ct. 1053, 1064 n 17 (1987). In addition, it has been clearly held that the means chosen must be narrowly tailored to achieve "[a] compelling governmental interest." *Wygant* v. *Jackson Bd. of Ed.*, 476 U.S. 267, 274, 106 S.Ct. 1842, 1847 (1986) (Court held that after entry hiring percentage levels were achieved, unlawful to layoff teachers to maintain racial quotas). *See City of Richmond* v. *J.A. Crosson Co.*, 480 U.S. 469, 109 S.Ct. 706, 721 (1989) (violation of Equal Protection provision to establish a minority set-aside program where no related discrimination shown).

A decree may be struck down if it is not narrowly tailored to meet objectives. *Paradise*, 480 U.S. at 171, 107 S.Ct. at 1066-1067. In determining whether race-based remedies are narrowly tailored, several factors must be considered; necessity of the relief; efficacy of alternative remedies; flexibility and duration of the relief; waiver provisions; relationship of numerical goals to the labor market; and impact of relief on third parties. *Paradise*, 480 U.S. at 171, 107 S.Ct. at 1066-1067.

In the instant case the original objectives that were set out in the Court decree have been clearly met by a racial composition in the BFD that exceeds the 16% of the population that was Black in the city of Boston at the time of the entry of the decree in 1974. While ignoring the original goals, the defendants have and are providing for race-conscious relief on a one-for-one basis. *See Boston Chapter, NAACP, Inc.* v. *Beecher*, 371 F.Supp. 507 (1974).

Most importantly, in addition to the original goals, the District Court mandated that any future examinations:

> [s]hall be demonstrably job-related and validated in accordance with the 'Guidelines on Employees Selection Procedures' issued by the Equal Employ-

> ment Opportunity Commission, 29 C.F.R. § 1607, et seq., or otherwise shown to have no discriminatory impact.

Id. at 521.

Without question, the hiring of minorities on a quota basis has been considered an extreme measure to be conducted on a temporary basis. "[W]hen the goal is achieved, the use of any ration is to cease." *Vulcan Soc'y of Westchester County, Inc.* v. *Fire Dep't of City of White Plains*, 505 F.Supp. 955, 962 (S.D.N.Y. 1981). An overview of the cases cited by the Court in Boston Chapter NAACP in support of the consent decree indicates that the use of preferential quotas for hiring ended by 1984. *See Vulcan Soc'y* v. *Civil Serv. Comm'n*, 588 F.Supp. 727 (D. N.J. 1984) (hiring goals displacing quota minority hirings); *Bridgeport Guardians, Inc.* v. *Members of the Bridgeport Civil Serv. Comm'n*, 354 F.Supp. 778, 784 (D. Conn. 1973) (quota hiring to end at 15%, although minority population 25%); *Officers for Justice* v. *Civil Serv. Comm'n of City and County of San Francisco*, 395 F.Supp. 378 (N.D. Cal. 1975) (three minorities for two whites quota ended upon the development of racially neutral examination).

The primary goal of the courts that have entered consent decrees of this nature has been the establishment of non-discriminatory entrance examinations. Once this primary goal is established the consent decrees are to end. The Supreme Court, in approving a preferential hiring decree, noted the limited scope of the order:

> *Most significantly, the one for one requirement is ephemeral*; the term of its application is contingent upon the department's own conduct. The requirement endures only until the department comes up with a procedure that does not have a discriminatory impact on blacks . . .

Paradise, 480 U.S. at 164 (emphasis added).

III. The Decision Below Does Not Follow the Rule of This Court Enunciated in *City of Richmond* v. *J.A. Crosson Co.*

The *Crosson* case significantly limited the use of racial quotas by governmental entities. The holding in *Crosson* provides that the equal protection clause precludes states and municipalities from discriminating in favor of minorities over other races to rectify statistical discrimination. Racial discrimination in any form is unconstitutional unless its purpose is to provide a remedy of identified racial misconduct. The majority of the court held that all racial classifications must pass "strict scrutiny" and must be justified by a compelling governmental interest. The court also required that identified discriminatory practices must be demonstrated on the record in order to justify racial set-asides or quotas. While rejecting the government's argument that the statistical data within the construction industry was sufficient to justify racial preference for minority contractors, Justice O'Connor stated: "There is nothing approaching a constitutional or statutory violation by anyone in the Richmond Construction Industry." 488 U.S. at 500.

In addition to the holding in *Crosson*, this court has held past discrimination must be identified and a causal connection established. In *Wards Cove Packing Co.* v. *Antonio*, 490 U.S. 642 (1989) the majority of this court made clear in a Title VII case, that statistical disparity is not sufficient to state a *prima facie* case. It must be demonstrated that specific employment practices have been identified and a causal connection established between those practices and the exclusion of a minority. *Ward*, 490 U.S. at 656-657.

While the court below acknowledged that "strict scrutiny" was the standard to be applied, they did not in fact apply it. While addressing the petitioners' contention that a non-discriminatory EEOC examination had been administered prior to

the establishment of the eligibility list where the petitioners' names appeared the court stated: "[E]ven a cursory reading makes it crystal clear that validated examinations are not an end in themselves but merely a means toward achieving the decree's actual obective: rough parity . . ." *Mackin* v. *City of Boston*, 969 F.2d 1273 at 1277 (1st Cir. 1992). If in fact the lower court followed what was preached, indubitably "rough parity" has been achieved in the instant case.

Whether the examination is valid or not is most certainly material to this case because of the holding of *Boston Chapter, NAACP, Inc.*, 371 F.Supp. at 521. *See Richardson* v. *Lamar County Bd. of Educ.*, 729 F.Supp. 806, 816 (M.D. Ala. 1989) (It is well established in testing cases that an examination is validated by comparison to actual pool of examination takers and comparison to pass-fail rates); *Bertoncini* v. *City of Providence*, 767 F.Supp. 1194, 1202 (D.R.I. 1991) (Validated examination is one that predicts job performance).

The lower court gave short shrift to the great strides that had been accomplished since the beginning of the case in 1972. Although in the original case the court found that the examination that was given had a disparate impact on minorities, trememdous strides were made to remedy the situation since the original order in 1974. The Boston Fire Department has had a history of substantial compliance, starting with less than 1% of the Boston Fire Department composed of blacks at the time of the court's original order and increasing that figure to over 16% by January 1, 1985, with further gains to 20.3% by November 1, 1990 (App. B. 24a-25a).

The lower court totally ignored the great strides that have been made by the Boston Fire Department for the last eighteen years. The court, while sidestepping the issue, held that the Boston Fire Department had not reached "parity" based on the 1990 federal census figures for blacks in the city of Boston: the federal census that was taken after the litigation was filed and the actions complained of occurred (App. A. 12a-15a).

Because the plaintiffs established facts in the lower court that a non-discriminatory examination had been given and the Boston Fire Department had made tremendous strides in remedying the past effects of any discrimination that may have occurred prior to 1974, there is no "strong" or "firm" basis in the evidence of prior discrimination.

Lastly, in the seminal case of *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 106 S.Ct. 1842 (1986), the Court was confronted with a union contract provision that mandated layoffs on the basis of race to maintain minority racial quotas within the City of Jackson's school system. The provision contravened a contractual clause requiring strict seniority for layoffs. *Id.* at 272. The Court set out a two-pronged test, "[W]e must decide whether the layoff provision is supported by a compelling state purpose and whether the means chosen to accomplish the purpose are narrowly tailored. *Id.* at 274.

The Court, while striking down the layoff plan, rejected the argument that it was justified to serve a compelling state interest because of the serious racial discrimination in the country:

> Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. The role model theory announced by the District Court and the resultant holding typify this indefiniteness. There are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind. In fact, there is no apparent connection between the two groups. Nevertheless, the District Court combined irrelevant comparisons between these two groups with an indisputable statement that there has been societal discrimination, and upheld state action predicated upon racial classifications.

> No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over-expansive. *In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.*

Id. at 276 (emphasis added).

In the instant case it is undisputed that the original minority hiring goals have been met. It is also undisputed that anyone hired after the attainment of the goals could not have been victimized by unlawful discrimination.

Most importantly, the defendants have established a job related EEOC validated examination. Any preferential treatment that has been given has trammelled on the rights of the non-minority plaintiffs. *See* in re *Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492, 1501 (11th Cir. 1987) (*Aff'd*); *Martin* v. *Wilks*, 490 U.S. 758 (1989).

Based upon the uncontroverted facts that the city and state defendants have attained the original percentage goals and have been giving an EEOC validated examination, judgment is required for the petitioners as a matter of law. Fed. R. Civ. P. 56(c), *Celotex Corp.* v. *Catrett*, 479 U.S. 317, 323 (1986). *Brennan* v. *Hendrigan*, 888 F.2d 189, 191 (1st Cir. 1989).

Conclusion.

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Appendix A.

MACKIN v. CITY OF BOSTON
Cite as 969 F.2d 1273 (1st Cir. 1992)

Lawrence MACKIN, et al.,
Plaintiffs, Appellants,

v.

CITY OF BOSTON, et al.,
Defendants, Appellees.

No. 91-2207.

United States Court of Appeals,
First Circuit.

Heard May 5, 1992.
Decided July 6, 1992.

Thirty-five white male applicants for positions in city fire department sued city claiming discrimination based on race. The United States District Court for the District of Massachusetts, Walter Jay Skinner, J., entered judgment for city and appeal was taken. The Court of Appeals, Selya, Circuit Judge, held that: (1) decree requiring preferential treatment of minority fire fighter applicants, until their numbers in first department were same as proportion of minorities in general population, required that current percentage of minorities in population be matched within department rather than percentage at time decree was first issued, and (2) decree was not overbroad.

Affirmed.

1. Civil Rights — 391

When judicial decree affording race-conscious relief is challenged, decree must be subjected to strict scrutiny, requiring court to vouchsafe that relief is both warranted by strong state interest and narrowly tailored to further that interest.

2. Civil Rights — 393

Decree requiring that preference be given to minority fire fighter applications until their percentage on city fire departments was equal to their percentage in population, required that fire department minority population proportion equal that of present community, not proportion in community at time decree was issued.

3. Civil Rights — 393

City was not entitled to relief from decree requiring that preference be given to minority fire fighter applicants until percentage of minorities in fire department equaled percentage in community, by virtue of fact that entrance examinations given to applicants had been approved by Equal Employment Opportunity Commission; requirements of decree went beyond assuring fair entrance tests.

4. Civil Rights — 393

In assessing an overbreadth challenge to an order directing race-conscious relief in context of public employment, court should consider, inter alia, extent to which beneficiaries of order are specially advantaged, legitimate expectancies of others are frustrated or encumbered, order interferes with other valid state or local policies, and whether order contains (or fails to contain) built-in mechanisms which will, if time and events warrant, shrink its scope and limit its duration.

5. Civil Rights — 393

Decree requiring preferential treatment of minority applicants until their percentages on municipal fire departments equaled that of community was not overbroad; only qualified minority candidates who had passed entrance test were entitled to preference, nonminorities could not claim expectation to position as there were many highly qualified nonminority candidates with statutory preferences and perfect test scores, and decree had limited life span as it remained in force, by its own terms, only until requirements had been met.

6. Federal Civil Procedure — 2655

Fire fighter applicants purportedly aggrieved by court-mandated policy of preference to minority applicants were precluded from raising on motion for reconsideration, addressed to district court, claims that percentage of minorities to be attained in fire department should be based on percentage of working age minorities within community and that blacks and Spanish-surnamed individuals should be considered separately in determining whether goals had been reached; existence of these arguments had been known for appreciable period of time and they were not particularly strong.

Michael D. Powers, Charlestown, Mass., with whom Nicholas Foundas, Boston, Mass., was on brief, for plaintiffs, appellants.

Lisa J. Stark, Atty., U.S. Dept. of Justice, with whom John R. Dunne, Asst. Atty. Gen., David O. Simon, Acting Deputy Asst. Atty. Gen., and David K. Flynn, Atty., U.S. Dept. of Justice, Washington, D.C., were on brief, for the federal defendant appellee.

Albert W. Wallis, Corp. Counsel, and Stephen C. Pfaff, Asst. Corp. Counsel, Boston, Mass., on brief for the mun. defendants, appellees.

Scott Harshbarger, Atty. Gen., and William W. Porter, Asst. Atty. Gen., Boston, Mass., on brief for the state appellee.

Toni G. Wolfman, Richard M. Brunell, Foley, Hoag & Eliot, Alan Jay Rom, and Lawyers Committee for Civil Rights Under Law, Boston, Mass., on brief for defendant, appellee Boston Chapter, N.A.A.C.P., Inc.

Before SELYA, Circuit Judge, COFFIN, Senior Circuit Judge, and FUSTE,* District Judge.

SELYA, Circuit Judge.

Thirty-five white male applicants for positions in the Boston Fire Department (the Department) filed suit in the district court on September 14, 1989. The plaintiffs alleged that a bevy of named defendants, including the City of Boston, various municipal officials, and the state personnel administrator, discriminated against them on the basis of race both in constituting an eligibility list and in making appointments to positions within the Department by means of the list.[1] The district court granted summary judgment for the defendants. We affirm.

I. BACKGROUND

The two original suits described in note 1, *supra*, resulted in the entry of the so-called *Beecher* decree. *See Boston Chapter, NAACP, Inc. v. Beecher*, 371 F.Supp. 507, 520-23 (D.Mass.), *aff'd*, 504 F.2d 1017 (1st Cir.1974), *cert. denied*, 421 U.S. 910, 95 S.Ct. 1561, 43 L.Ed.2d 775 (1975). Since 1974, the hiring of firefighters in much of Massachusetts has

* Of the District of Puerto Rico, sitting by designation.

[1] The United States joined the defendants in opposing plaintiffs' requests for relief. The government's standing stems from the district court's grant of its motion to consolidate plaintiff's suit with two suits filed in the early 1970s, one of which was initiated by the United States, concerning the entry-level exam then used by the state and various municipalities, including Boston, to screen applicants for firefighters' positions. In additional, the Boston Chapter of the National Association for the Advancement of Colored People (NAACP) intervened as a defendant. It, too, opposed the plaintiffs' requests.

been circumscribed by this decree. Over time, the decree has been supplemented by several consent decrees designed to implement administrative procedures for offering examinations, establishing eligibility lists, releasing municipalities from continuing judicial oversight, and the like. We understand the plaintiffs to be challenging both the *Beecher* decree and the consent decrees entered to effectuate it. In general, however, we will refer to the decree in the singular, since it is the *Beecher* decree that is the cynosure of the parties' arguments.

Unlike some 30-odd other fire departments which heretofore met the goals of the decree and gained release from its constraints, the City of Boston remains under its aegis. In 1987, the state personnel administrator, conducted a written examination for the position of firefighter. The personnel administrator then compiled an eligibility list which gave preferential standing to blacks and Spanish-surnamed individuals.[2] Despite the fact that all 35 appellants earned perfect scores on the 1987 examination, they were ranked below several minority candidates who earned lower scores. As a result, appellants were disadvantaged with respect to vacant firefighter positions.

In this district court, appellants sought a salmagundi of relief, including an order placing their names at the top of the certified eligibility list and an injunction prohibiting continued preferential treatment of black and Spanish-surnamed persons in connection with available firefighting jobs. They contended that Boston had met the decree's objectives because, in 1989,

[2] The eligibility list was assembled according to the procedures specified in the decree. *See Beecher*, 371 F.Supp. at 522-23. Briefly stated, those procedures stipulated that the candidates placed on the list must have passed a properly validated qualifying examination and otherwise have met all eligibility requirements for the position. Beyond that point, the list was to consist of one minority candidate (i.e., black or Spanish-surnamed) for each white candidate. The decree contemplated the continued use of statutory preferences ceding pride of place to veterans, children of deceased or permanently disabled firefighters, and the like, *see, e.g.*, Mass. Gen. Laws Ann. ch. 31, §§ 26, 40 (1992), even if those persons achieved lower test scores than other qualified white candidates.

the Department had achieved a percentage of black and Spanish-surnamed members higher than the percentage of such minorities in Boston's general population at the time the decree was originally entered. Appellants also claimed that, to the extent anything remained to be done, the decree's ameliorative purposes could be satisfactorily accommodated without any affirmative action because the 1987 entrance examination for firefighters was race-neutral. Finally, appellants charged that the decree swept too broadly and, therefore, should not be enforced.

In due course, both sides moved for summary judgment. The district court denied the plaintiffs' motion and granted the defendants' motion. At that point, plaintiffs switched gears, moving for reconsideration on completely different grounds. The district court denied the motion. On appeal, plaintiffs protest both the entry of summary judgment and the ensuing refusal to reconsider.

II. THE LEGAL LANDSCAPE

[1] It is clear that, when a judicial decree affording race-conscious relief is challenged, the decree must be subjected to strict scrutiny. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494, 109 S.Ct. 706, 721, 102 L.Ed.2d 854 (1989) (plurality opinion); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273, 106 S.C.t 1842, 1846, 90 L.Ed.2d 260 (1986) (plurality opinion). Such scrutiny requires a reviewing court to vouchsafe that the relief is both warranted by a strong state interest and narrowly tailored to further that interest. *See Stuart v. Roache*, 951 F.2d 446, 449 (1st Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1948, 118 L.Ed.2d 553 (1992). It cannot be gainsaid that, when a race-conscious employment initiative is reasonably necessary to remedy the effects of past discrimination practiced by a public employer, a compelling state interest exists. *See United States v. Paradise*, 480 U.S.

149, 167, 107 S.Ct. 1053, 1064, 94 L.Ed.2d 203 (1987) (plurality opinion); *Stuart*, 951 F.2d at 449. In this case, appellants do not argue that the original finding of discrimination was flawed. Rather, their focus is on the continuing need for affirmative action, and particularly, the need for the type and kind of affirmative action required by the *Beecher* decree.

Along those lines, we believe that district courts should be flexible in considering requests for relaxation of, or release from, decrees which were initially established to bring about needed institutional reforms. *See Rufo v. Inmates of Suffolk County Jail*, ___ U.S. ___, 112 S.Ct. 748, 760, 116 L.Ed.2d 867 (1992) (considering motion to modify a consent decree). In the context of civil rights litigation, a central consideration in determining whether to dissolve structural remedies is whether the agency in question has come into compliance with constitutional requirements. Put another way, an inquiring court should ask whether the goals of the litigation, as incorporated in the outstanding decree, have been completely achieved. *Board of Educ. v. Dowell*, ___ U.S. ___, 111 S.Ct. 630, 636-37, 112 L.Ed.2d 715 (1991). Moreover, federal courts, in mulling whether to relax or abandon their supervision over the operation of local governmental units, should take federalism concerns into account, ever mindful that the "legal justification for displacement of local authority . . . is a violation of the Constitution by the local authorities." *Id.* 111 S.Ct. at 637. An intrusion by a federal court into the affairs of local government should be kept to a bare minimum and not be allowed to continue after the violation has abated and its pernicious effects have been cured.

To the extent that the plaintiffs here are seeking relaxation of one or more consent decrees, *see supra* p. 1274, it must be remembered that "a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants a revision of the decree." *Rufo*, 112

S.Ct. at 760. That party "may meet its initial burden by showing either a significant change in factual conditions or in law." *Id* Dissolution or relaxation of a consent decree may be justified in a variety of circumstances, for example, when "changed factual conditions make compliance with the decree substantially more onerous." *Id.; see also id.* 112 S.Ct. at 760-63 (listing other bases for modifying or dissolving a consent decree in the context of an institutional reform case).

III. ANALYSIS

It is against this backdrop that we turn to appellants' asseverational array. We treat serially with appellants' three main arguments. We then deal in one fell swoop with the exhortations contained in the motion for reconsideration.

A.

[2] Posting that the decree contemplates no more than the achievement of minority representation in the Department commensurate with the percentage of minorities resident in Boston at the time the decree was entered, appellants assert that the Department has already reached this modest principle. Even assuming that the factual premise anent the Department's present composition is true, thus postulate tortures the language of the decree, disregards the parties' consistent practice while operating under the decree, and defies common sense.

First, the relevant language of the decree is most naturally read as referring to contemporaneous population figures: "As a city or town achieves a complement of minorities commensurate with the percentage of minorities within the community, certification will be made according to existing Massachusetts law." *Beecher*, 371 F.Supp. at 523. Had the district court and the existing parties intended to embody in the decree a stipulation that a community would be released from the prescribed procedures upon reaching a complement of minorities com-

mensurate with the percentage of minorities within the community in 1974, we feel confident that the decree would have said so.

Second, the undisputed evidence concerning practice under the decree indicates beyond hope of contradiction that applications for the release of municipalities from the decree's burdens have universally been guided by reference to contemporaneous population statistics. Few things evidence a decree's meaning more persuasively than an immutable, decade-old pattern of past practice under the decree, consensually engaged in by all sides in the underlying litigation that produced the decree.

Third, common sense suggests that it would be whimsical to peg parity ratios to obsolete population figures in this sort of context. The logical extension of appellants' argument is that a locality could not be freed from the decree's requirements even if its minority population dropped precipitously, to the point where the percentage of minority firefighters in service far exceeded the current percentage of minorities in the relevant population, as long as the percentage of minority firefighters remained lower than the 1974 percentage. We think it is farfetched to assume that the district court or the parties intended the decree to work in so quirky a fashion.

In addition to the obvious practical problems with using outdated statistics, there are also sound legal reasons for reading the terms of the decree to refer to current population levels. One implication of the recent Supreme Court school desegregation decisions is that federal courts, at least in the minerun of civil rights and institutional reform cases, have no choice but to make decisions about the maintenance, modification, or dissolution of structural remedial orders by referring to the most current population statistics readily available. After all, knowledge of demographic shifts is essential for determining whether patterns of minority representation in state institutions and organizations reflect state action, which has constitutional

implications, or private preferences, which, generally, do not. *See, e.g., Freeman v. Pitts*, ___ U.S. ___, 112 S.Ct. 1430, 1437-38, 1447-48, 118 L.Ed.2d 108 (1992). We think that the plaintiffs' effort to cling to 1974 statistics, notwithstanding the availability of supervening census data, contradicts *Freeman*'s teachings.

In sum, achieving parity in 1974 terms, without more, was not a particularly significant dictum. In any event, it did not serve, in 1989, as a legally sufficient basis for defenestrating the *Beecher* decree.

B.

[3] Next, appellants contend that the decree was satisfied because the qualifying examination that they passed was validated under EEOC guidelines and was, therefore, nondiscriminatory. This argument overlooks the language of the decree itself. Even a cursory reading makes it crystal clear that validated examinations are not an end in themselves but merely a means toward achieving the decree's actual objective: rough parity (to remedy the effects of past discrimination). *See, e.g., Beecher*, 371 F.Supp. at 522 ("Subsequent to obtaining the results of a valid examination, the defendant . . . shall promptly commence certifying applicants as eligible for appointment [in the manner directed by the decree]. . . ."); *id.* at 522-23 (specifying that the "hiring procedure shall apply to all future eligibility lists established subsequent to a valid firefighter entrance examination"). The argument to the contrary is a mere heuristic.[5]

[5]The district court, noting that the test's validity was disputed, correctly ruled that the issue was not material. Even if the examination was non-discriminatory, as appellants alleged, the paucity of minority representation in the Department betokened a failure to achieve the central goal of the decree, thus negating any argument that the purposes of the decree had been achieved. Summary judgment was, therefore, appropriate. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986) (stating that "the mere

[4] The appellants also hawk the idea that, even if the goals of the *Beecher* decree have not yet been accomplished, the decree is constitutionally infirm because it sweeps too broadly. This argument is by no means a new one. Over 15 years ago, we found the decree to be narrowly tailored toward the achievement of its legitimate objectives. *See Beecher*, 504 F.2d at 1027 (judging the decree to be "carefully limited in extent and duration"). To be sure, in the intervening years the tests for determining whether remedial race-conscious relief is, in fact, narrowly tailored have been refined and clarified. *See, e.g., Paradise*, 480 U.S. at 177-79, 107 S.Ct. at 1069-71 (plurality opinion); *Stuart*, 951 F.2d at 453-55. But, that process of refinement and clarification does nothing to call the adequacy of the instant decree into serious question.

We will not wax longiloquent. In determining whether or not an order is narrowly tailored, a significant measure of deference is owed to the trial court's conclusion that a particular kind of relief is essential to heal a constitutional wound. *See Paradise*, 480 U.S. at 183, 107 S.Ct. at 1072-73 (plurality opinion). The district court, unlike the court of appeals, "has firsthand experience with the parties and is best qualified to deal with the 'flinty, intractable realities of day-to-day implementation of constitutional commands.' " *Id.* at 184, 107 S.Ct. at 1073 (citation omitted). While a district court's discretion is not unbridled, a reviewing court, in assessing whether a remedy is narrowly tailored, must bear in mind that the fashioning of a structural decree, like the decision as to whether to modify or dissolve it, is at bottom an exercise of equitable

existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment" absent the existence of a genuine issue of material fact); *Mesnick* v. *General Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991) ("Not every discrepancy in the proof is enough to forestall a properly supported motion for summary judgment; the disagreement must relate to some genuine issue of material fact."), *petition for cert. filed*, 60 U.S.L.W. 3689 (U.S. March 9, 1992).

power. *See Freeman*, 112 S.Ct. at 1444. Given this deferential standard of review, appellants are whistling past the graveyard — albeit whistling rather loudly — in inveighing against the reach of the decree's remedial provisions.

In assessing an overbreadth challenge to an order directing race-conscious relief in the context of public employment, a court should consider, *inter alia*, the extent to which (i) the beneficiaries of the order are specially advantaged, (ii) the legitimate expectancies of other are frustrated or encumbered, (iii) the order interferes with other valid state or local policies, and (iv) the order contains (or fails to contain) built-in mechanisms which will, if time and events warrant, shrink its scope and limit its duration. The *Beecher* decree passes this test with flying colors.

[5] In this case, only *qualified* minority candidates are specially advantaged; no minority candidate is placed on the eligibility list unless he or she has attained a passing score on the entrance examination. This is an important indicium of narrow tailoring. *See Stuart*, 951 F.2d at 454. Relatedly, the decree does not require that minority aspirants be appointed, nor does it dispense with the statutory preferences mandated by state law. Thus, the decree gives only a limited advantage, not a guarantee of employment, to minority applicants. This, too, is a significant factor. *See Johnson* v. *Transportation Agency*, 480 U.S. 616, 638, 107 S.Ct. 1442, 1455, 94 L.Ed.2d 615 (1987) (approving affirmative action plan because, among other things, rather than mandating quota hiring, it "merely authorize[d] that consideration be given to affirmative action concerns when evaluating qualified applicants"). As a result of these features, it can appropriately be said that the *Beecher* decree "is not being used simply to achieve and maintain racial balance, but rather as a benchmark against which the court could gauge . . . efforts to remedy past discrimination." *Local 28, Sheet Metal Workers' Int'l Ass'n* v. *EEOC*, 478 U.S. 421,

477-78, 106 S.Ct. 3019, 3051, 92 L.Ed.2d 344 (1986) (plurality opinion).

Moreover, the failure to appoint more high-scoring white applicants under the decree disturbs no legitimate, firmly rooted expectations on the part of those applicants. The record shows that, when appellants sought appointment to the Department, there were many white candidates with statutory preferences and perfect tests scores, and few firefighters' vacancies. Hence, irrespective of the decree, appellants could not reasonably have felt assured that they could be appointed. This factor, too, counsels in favor of upholding the decree. *See Stuart*, 951 F.2d at 454.

Finally the decree's life is limited, remaining in force only until its requirements have been met. *See Beecher*, 371 F.Supp. at 523 (providing for release from appointment process mandated by the decree "[a]s a city or town achieves a complement of minorities commensurate with the percentage of minorities within the community"). Limitations of this sort are crucial factors in deflecting overbreadth challenges. *See Stuart*, 951 F.2d at 454. Indeed, the proof of the present pudding is that, since 1974, more than fifty percent of the communities originally affected by the decree have already been freed from further oversight.

Mindful of these realities, we conclude that the *Beecher* decree is tailored with sufficient precision to withstand the appellants' imprecations.

D.

[6] On the motion for reconsideration, appellants unsuccessfully attempted to raise two additional arguments. They claimed, first, that the Department's achievements under the decree should be measured not by reference to the census figures for black and Spanish-surnamed individuals in the general population, but by reference to the census of such persons

age 18 or older, thus dovetailing more snugly with the relevant labor pool. They also suggested that blacks and Spanish-surnamed individuals should be considered separately; and that, therefore, black aspirants should not be entitled to a continuing preference as Boston had exceeded the decree's goals with respect to black firefighters.

We need not dwell on the subtance of these arguments. It is settled law that, once a motion to dismiss or a motion for summary judgment has been granted, the district court has substantial discretion in deciding whether to reopen the proceedings in order to allow the unsuccessful party to introduce new material or argue a new theory. *See Mariani-Giron* v. *Acevedo-Ruiz*, 945 F.2d 1, 3 (1st Cir. 1991); *United States* v. *5 Bell Rock Road*, 896 F.2d 605, 611 (1st Cir. 1990); *Appeal of Sun Pipe Line Co.*, 831 F.2d 22, 25 (1st Cir. 1987), *cert. denied*, 486 U.S. 1055, 108 S.Ct. 2821, 100 L.Ed.2d 922 (1988); *Polyplastics, Inc.* v. *Transconex, Inc.*, 827 F.2d 859, 864 n.4 (1st Cir. 1987); *Pagan* v. *American Airlines, Inc.*, 534 F.2d 990, 992-93 (1st Cir. 1976). Consequently, we will overturn the trial court's decision on such a matter only if an appellant can persuade us that the refusal to grant favorable reconsideration was a clear abuse of discretion. *Sun Pipe Line*, 831 F.2d at 25; *Pagan*, 534 F.2d at 993.

Here, there is not so much as a whisper of a hint of an intimation of an abuse of discretion. The statistics upon which appellants belatedly sought to rely (in order to show a more precisely defined labor pool) were available to them all along. Moreover, those statistics, fairly read, likely tell a different story than appellants intend to convey. The most pertinent "labor pool" information that can be gleaned from the 1980 census figures is the head count of black and Spanish-surnamed individuals who were ten years of age, or older, in 1980 — a number which would give some approximate indication of the number of black and Spanish-surnamed individuals who,

in 1989, were old enough to be considered for firefighters' positions.[4] Based on those figures, a continuing lack of parity in the Department is statistically evident.

Appellants' other "new" argument — that the percentage figures for black and Spanish-surnamed individuals should be dismembered, so that once parity with the percentage of blacks in the labor force is achieved, the decree's guidelines for certifying blacks to the eligibility list should be lifted — fares no better. Once again, the argument relied on information that was available well before the time suit was started. Moreover, such an approach clearly contradicts the format of the original litigation, which constituted combined classes of black and Spanish-surnamed persons, not separate black and Spanish-surnamed classes. It also contradicts the clear intent of the decree and an unbroken skein of preexisting practice under the decree's terms.

When the losing party seeks reconsideration of an adverse judgment on a neoteric theory, factors such as due diligence and likelihood of success must weigh heavily in the balance. Where, as here, the movants' newly emergent arguments seem weak and the movants have offered no viable excuse for not advancing those arguments in a timely fasion when the parties cross-moved for summary judgment, we are unable to discern any principled basis on which the district court's denial of the motion for reconsideration might be overturned. In this case, as in most similarly postured cases, the district court's refusal to allow appellants the opportunity to revisit the barn after the horse has departed cannot be considered an abuse of discretion.

Affirmed.

[4] Under state law, *see* Mass. Gen. Laws Ann. c. 31, § 58 (1992), firefighters must be at least 19 years of age to qualify for appointment.

Appendix B.

United States District Court
for the District of Massachusetts

LAWRENCE MACKIN, ET AL.,
Plaintiffs,

v.

CITY OF BOSTON, ET AL.,
Defendants.

BOSTON CHAPTER, NAACP, ET AL.,
Plaintiffs,

v.

NANCY B. BEECHER, ET AL.,
Defendants.

UNITED STATES OF AMERICA,
Plaintiff,

v.

CITY OF BOSTON, ET AL.,
Defendants.

Final Judgment.

These consolidated actions came on before this Court on cross-motions by all parties for summary judgment in the action entitled *Mackin, et al.* v. *City of Boston, et al.*, and the Court having rendered a decision on those cross-motions by Memorandum and Order dated June 21, 1991 and having denied plaintiffs' motion for reconsideration by Order dated July 19, 1991.

It is Hereby Ordered and Adjudged

That the action entitled *Mackin, et al.* v. *City of Boston, et al.*, be dismissed on the merits and that defendants recover of plaintiffs Mackin et al. their costs of action.

By the Court,

/s/ _____

Dated: October 28, 1991

United States District Court
District of Massachusetts

LAWRENCE MACKIN, ET AL.,
Plaintiffs,

v.

CITY OF BOSTON, ET AL.,
Defendants.

CIVIL ACTION
No. 89-2025-S

ORDER ON PLAINTIFFS' MOTION FOR RECONSIDERATION OF THEIR MOTION FOR SUMMARY JUDGMENT

July 19, 1991

SKINNER, D.J.

On June 21, 1991, I denied the plaintiffs' motion for summary judgment and allowed the defendants' motion for summary judgment. The plaintiffs now move for reconsideration of that order.

In my July 21 order I found that the City of Boston had not satisfied the terms of the *Beecher* consent decree and therefore could not join the list of communities that have been exempted from it. I found that, as of November 1, 1990, the Boston Fire Department was 20.3% black and 3.3% Hispanic, for a total minority percentage of 23.6%. I also found that, according to the 1980 federal census, which was the most recent census available at the time, the City of Boston's population was 22.4% black and 6.4% of Spanish origin, for a total minority population of 28.8%.

The plaintiffs now argue that since Massachusetts law requires a person to be 19 years of age to qualify to take the Civil Service examination for firefighter, the relevant compari-

son should be the racial composition of Boston's 19 and over population. The plaintiffs claim that according to the 1980 census, the total minority percentage of the Boston population over 18 was 23.6%. They argue, therefore, that the Boston Fire Department has reached parity.

The defendants have provided statistics from the 1990 census. These show that the total number of minorities who were 18 years and older at the time of the 1990 census was 138,049, which constitutes 29.72% of Boston's total 18 and over population of 464,450.[1]

Since the most relevant comparison to November 1990 Boston Fire Department statistics is 1990 population figures, if any 18 and over statistics are to be used, they should be taken from the 1990 census. According to those figures, the Boston Fire Department still has not reached parity under the *Beecher* decree.

Accordingly, the plaintiffs' motion for reconsideration is **denied**.

_____

United States District Judge

[1] The parties have provided statistics from the 1990 census showing the 18 and over population. These statistics do not show the 19 and over population.

United States District Court
District of Massachusetts

LAWRENCE MACKIN, ET AL.,
Plaintiffs,

v.

CITY OF BOSTON, ET AL.,
Defendants.

CIVIL ACTION
No. 89-2025-S

MEMORANDUM AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

June 21, 1991

SKINNER, D.J.

In this action thirty-five white firefighters claim that the defendants have discriminated against them on the basis of race in appointments to the permanent position of firefighter in the Boston Fire Department ("BFD"). The defendants are the City of Boston, Raymond Flynn, Mayor of Boston, Leo Stapleton, Boston Fire Commissioner, and David Haley, Personnel Administrator of the Massachusetts Department of Personnel Administration. The amended complaint contains three counts: Count One is under the equal protection clause and 42 U.S.C. § 1983; Count Two is for violation of a court decree; and Count Three is under 42 U.S.C. § 2000(e). The plaintiffs seek an injunction ordering the defendants to place the plaintiffs' names at the top of the hiring eligibility list, an injunction restraining the defendants from giving preferential hiring treatment to black and Spanish-surnamed persons for the position of firefighter, and compensatory and punitive damages.

The amended complaint alleges that all thirty-five plaintiffs took the entrance examination for the position of Boston fire-

fighter in December 7, 1987. The complaint also alleges that all the plaintiffs received perfect scores of 100% on the examination and that they are qualified for the position of firefighter in all other respects. In the spring of 1988, the BFD requested an eligibility list of candidates from the Department of Personnel Administration ("DPA") to appoint persons to the permanent position of firefighter in the City of Boston. Defendant Haley, allegedly relying on a decree entered in the District Court for the District of Massachusetts,[1] submitted an eligibility list which gave preferential treatment to blacks and Spanish-surnamed people who had scores on the written examination that were lower than the plaintiffs'. The plaintiffs allege that they were passed over for appointment solely on the basis of their race.

The defendants argue that the decree entered by the district court in *Boston Chapter, NAACP, Inc.* v. *Beecher*, 371 F.Supp. 507 (D. Mass. 1974), and affirmed by our court of appeals in 504 F.2d 1017 (1st Cir. 1974), does not violate the plaintiffs' constitutional rights. They further argue that the BFD may not be exempted from the requirements of the decree because it still has not appointed enough blacks and Hispanics to reach parity within the meaning of the decree. The parties have filed cross-motions for summary judgment.

Background

In 1972 and 1973, the United States and the NAACP brought actions against the City of Boston and the Massachusetts Civil Service Division. The plaintiffs claimed that the defendants were discriminating against blacks and Spanish-surnamed people in their qualification requirements and in their overall hiring policies for the position of firefighter. *Beecher*, 371

[1] *See Boston Chapter, NAACP, Inc.* v. *Beecher*, 371 F.Supp. 507 (D. Mass. 1974), *aff'd*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).

F.Supp. at 509. Judge Freedman, relying principally on the discrepancy between the proportion of blacks in the population and the proportion of blacks in the fire departments, found that the plaintiffs had established a *prima facie* showing that the firefighter entrance examination had a discriminatory effect on blacks and Spanish-surnamed persons. *Id.* at 514. Judge Freedman next concluded that the defendants had not met their burden of demonstrating that the exam was substantially related to job performance. *Id.* at 517. The court issued a decree ordering that any entrance examination used in the future would have to be demonstrably job-related and validated in accordance with the employee selection procedures issued by the Equal Employment Opportunity Commission ("EEOC"), 29 C.F.R. § 1607.1 *et seq.*, or otherwise shown to have no discriminatory impact. For the cities of Boston and Springfield, the court ordered that after obtaining the results of a validated examination, the Civil Service Division would establish an eligibility list consisting of one minority candidate for each white candidate. *Id.* at 522. This preferential hiring procedure would remain in effect until the city achieved "a complement of minorities commensurate with the percentage of minorities within the community. . . ." *Id.* at 523.

Our court of appeals affirmed Judge Freedman's decision, noting that in the 1970 census figures showed that although over 16% of Boston's population was black, less than 1% of Boston's firefighters were black. *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017, 1020 n.4 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). The court also noted that nearly 3% of Boston's population was Spanish-surnamed, but only 0.1% (two individuals) of Boston's firefighters were Spanish-surnamed. *Id.* The court of appeals agreed with the district court's conclusion that the civil service test was not substantially related to job performance. *Id.* at 1024. The court ruled that the remedy chosen by the district court was constitu-

tional, went "no further than to eliminate the lingering effects of previous practices that bore more heavily than was warranted on minorities," and was "carefully limited in extent and duration. . . ." *Id.* at 1026-27. The court also rejected the defendants' argument that the race-conscious remedy violated Title VII. *Id.* at 1028.

In 1975, the parties to *Beecher* signed an Interim Consent Decree and an Agreement to Effectuate Interim Consent Decree. Both decrees stated that whenever a particular city or town achieved a complement of post-probationary black and Spanish-surnamed firefighters commensurate with the percentage of minorities in the community, and demonstrated compliance with other requirements of the court decree, that city or town would be exempted from the decree. (Interim Consent Decree at ¶ 7; Agreement to Effectuate Interim Consent Decree at ¶ 11). Of the fifty-eight communities initially subject to the court decree, thirty-four have reached "parity" and have been exempted from the decree. (Haley Aff., ¶ 5; Letter from David Haley to Town of Clinton). The remaining twenty-four communities, including Boston, remain subject to the decree. *Id.*

Discussion

The BFD has not Satisfied the Terms of the 1974 Decree

The plaintiffs argue that the BFD should join the list of communities that have been exempted from the decree. They cite statistics showing that as of November 1, 1990, 20.3% of the Boston Fire Department was black, and 3.3% were Hispanic, for a total minority percentage of 23.6%. (Lockhead Aff., ¶ 3) The plaintiffs claim that the BFD has satisfied the terms of the *Beecher* decree because the current minority percentage in the BFD exceeds the minority percentage in Boston in 1974, when the decree was entered. Judge Freedman stated in his 1974 opinion that Boston had a black population of approximately 16%, and that the combined minority population

in Boston may exceed 23%. 371 F.Supp. at 514. The plaintiffs conclude that since the Department has a higher percentage of blacks than Boston had in 1974, the decree no longer applies to Boston.

The defendants respond to this argument by stating that from the outset, all parties to the *NAACP* v. *Beecher* action have understood, and have acted on the understanding, that the population parity goal set by this court's order refers to current population statistics at the time that a request for an exemption is made, not as of 1970 or 1974. (Haley Aff., ¶ 2) In a 1986 memorandum to appointing authorities subject to the decree, Mr. Haley instructed the authorities to use the most recent federal census figures when determining whether an exemption is warranted. (Haley Memorandum, March 19, 1986) According to the 1980 federal census, the most recent statistics cited by the parties, Boston's population was 22.4% black and 6.4% of Spanish origin, for a total minority population of 28.8%. (Defendant-Intervenor NAACP's Exhibit 4) As I stated earlier, the BFD is currently 23.6% minority.

Both Judge Freedman's opinion and the parties' subsequent agreement stated that the decree would remain in effect until a city or town achieved a complement of minorities commensurate with the percentage of minorities within the community. *See* 371 F.Supp. at 523; Interim Consent Decree dated April 7, 1975 at ¶ 7. The plaintiffs have presented no direct evidence that the purpose of the 1974 decree was to exempt departments who reached parity with the 1970 or 1974 population statistics. The plaintiffs rely instead on the argument that the original goals of the decree have been met, and on their claim that the defendants have established EEOC-validated examination. Based on my review of the evidence submitted by the parties and the *Beecher* opinion, I find that the 1974 decree refers to current population statistics, and that the Boston Fire Department has not reached parity within the terms of the decree.

The Decree is Valid

Since I have concluded that the BFD has not reached parity within the terms of the 1974 decree, the only basis for granting the plaintiffs relief would be to find that the decree itself is invalid. The plaintiffs claim that the hiring practices mandated by the decree are not narrowly tailored. Since the entry of the decree, whenever a class of new firefighters is to be appointed in Boston, one-half of the candidates certified for appointment from the eligibility list must be minorities. All candidates who have statutory preferences (i.e., veterans and the children of public safety officers who died or were injured in the line of duty) are given preference over those who lack such a preference, regardless of their relative test scores. In addition, permanent firefighters who have been laid off from other municipal fire departments must be considered for employment before any of the candidates on the regular eligibility list. M.G.L. c. 39, § 40. The preferential hiring required by *Beecher* does not apply to those with statutory preferences. (Dale Aff.)

It is well established that government bodies, including courts, may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination. *United States* v. *Paradise*, 480 U.S. 149, 166 (1987). The Supreme Court in *Paradise* noted that it had not yet reached a consensus on which level of scrutiny should be applied to racial distinctions made for remedial purposes. 480 U.S. at 166. Two years later, in *City of Richmond* v. *J.A. Croson Company*, 488 U.S. 469, 109 S.Ct. 706 (1989), the majority agreed that the standard of review under the equal protection clause did not depend on the race of those burdened or benefited by a particular classification. 488 U.S. at 494. The plurality in *Croson* stated its *continued adherence to the standard of review employed in Wygant." Id.* In both *Croson* and *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986), the Court applied strict scrutiny to the racial classifica-

tion at issue. Under the strict scrutiny standard, the racial classification must be supported by a compelling governmental purpose, and the means chosen to accomplish that purpose must be narrowly tailored. *See Wygant*, 476 U.S. at 274; *Croson*, 488 U.S. at 493-94.

Rather than requiring a formal finding of past discrimination, the Court in *Croson* and *Wygant* has required that the employer have a "strong basis in evidence for its conclusion that remedial action was necessary." *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277). Once the employer introduces statistical proof as evidence of its remedial purpose, the nonminority employees bear the burden of persuading the court that the employer's evidence did not support an inference of prior discrimination, or that the plan was not narrowly tailored. "Only by meeting this burden could the plaintiffs establish a violation of their constitutional rights, and thereby defeat the presumption that the [employer's] assertedly remedial action based on the statistical evidence was justified." *Wygant*, 476 U.S. at 293 (O'Connor, J., concurring).

I find that the district court in 1974 had a strong basis in evidence for its conclusion that remedial action was necessary to compensate for the past discrimination against blacks and Spanish-surnamed persons in the Boston Fire Department. As stated above, in 1974 less than 1% of the firefighters in the Department were black, whereas the population of Boston was over 16% black. Although Boston's population was almost 3% Hispanic, only 0.1% of Boston's firefighters were Hispanic. In addition to the statistical evidence, there is evidence that prior to 1974, the Department had not been using promotional examinations that had been validated in accordance with the "Uniform Guidelines on Employee Selection Procedures," 29 C.F.R. § 1607.1 *et seq.*

I find that the evidence above goes far beyond a mere showing of societal discrimination and satisfies the standard set out by the Supreme Court in *Croson*. The plurality in *Croson* stated:

> There is no doubt that "[w]here gross statistical disparities can be shown, they alone in a proper case may constitute *prima facie* proof of a pattern or practice of discrimination" under Title VII. *Hazelwood School Dist.* v. *United States*, 433 U.S. 299, 307-308 (1977). . . . In the employment context, we have recognized that for certain entry level positions or positions requiring minimal training, statistical comparisons of the racial composition of an employer's work force to the racial composition of the relevant population may be probative of a pattern of discrimination.

488 U.S. at 501. Since entry-level firefighter positions require minimal or no prior training, I find that Judge Freedman's use of population statistics was appropriate. The racial classifications contained in the court's decree were supported by a compelling governmental interest.

Under the second prong of the strict scrutiny standard, the means chosen to accomplish the compelling governmental interest must be narrowly tailored. The plaintiffs claim that the relief ordered by Judge Freedman is not narrowly tailored. They argue that although the original objective of the decree has been met, the defendants continue to provide for race-conscious relief on a one-for-one basis. The plaintiffs also assert that the examination they took in December 1987 was job-related and EEOC validated.

I find, however, that the court's decree is narrowly tailored. For the reasons stated above, I find that the decree's objectives have not been achieved in the case of the BFD. The parties dispute whether the current examination is valid. According to the defendant-intervenor NAACP, the December 1987 firefighter examination was validated only for the purpose of setting a passing score at a point at which there was no adverse

impact on minority test-takers. NAACP claims that the examination was not validated, however, for the purposes of ranking candidates who received scores of 79 and above. The Department of Personnel Administration's Report on the Proposed Passing Point for the 1987 examination concluded that when the passing point for the examination was set at 70%, the pass rate of minority applicants was at least 4/5 of that of white applicants. DPA also states that there is not enough evidence to establish whether the current firefighter examination is valid. DPA expects to have a validation study completed by the time the BFD reaches parity under the decree. (Dale Aff., ¶ 12)

This dispute among the parties as to whether the examination is valid is not material to this case. Judge Freedman's order does not expire merely because a validated examination is given. No department can be exempted until it reaches parity with the minority population. *Beecher*, 371 F.Supp. at 523; Agreement to Effectuate Interim Consent Decree, ¶ 11. The plaintiffs claim that if NAACP is correct that the examination is not valid, then the court order could not have terminated for the thirty-four communities who have been exempted to date. The issue of whether other communities have been properly exempted is not before me. I do find that the BFD is not eligible for an exemption at present.

In all other respects, I find that the relief ordered by Judge Freedman is narrowly tailored. Relief in the form of one-black-for-one-white promotions has been held by the Supreme Court to withstand strict scrutiny. *United States* v. *Paradise*, 480 U.S. 149 (1987). The Court in *Paradise* stated:

> In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions;

> the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

480 U.S. at 171.

In find that this decree satisfies the standards set out by the Court in *Paradise*. Given the historically low representation of minorities in the BFD and the use of non-validated examination, Judge Freedman reasonably concluded that the preferential hiring remedy was necessary. Under the decree, only black and Hispanic applicants who pass the eligibility examination and are otherwise qualified are eligible for selection. *Beecher*, 371 F.Supp. at 522. Although some whites may have been passed over for promotion by blacks and Hispanics with lower examination scores, the decree does not "unnecessarily trammel the interests of the white employees." *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 208 (1979). No whites have been discharged or demoted under the terms of the decree. Nor does the plan create "an absolute bar to the advancement of white employees. . . ." *Weber*, 443 U.S. at 208. As the Supreme Court noted in *Wygant*, "[d]enial of a future employment opportunity is not as intrusive as loss of an existing job." 476 U.S. at 283-283. Finally, "the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." *Weber*, 443 U.S. at 208. As soon as a community reaches parity with the local population, it is exempted from the decree. In sum, the defendants have not violated the plaintiffs' right to equal protection under the fourteenth amendment.

I also conclude that the defendants have not violated Title VII. Once a plaintiff establishes a *prima facie* case that race has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of

an affirmative action plan provides such a rationale. *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U.S. 616, 626 (1987). If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid. *Id.* In determining whether an historical imbalance exists that would justify taking race into account, for jobs requiring no special expertise it is appropriate to compare the percentage of minorities in the employer's work force with the percentage in the general population. *Johnson*, 480 U.S. at 631-632. In this case, there was an historical underrepresentation of minorities in the BFD, and the plaintiffs have produced no evidence that the defendants' preferential hiring procedures pursuant to the court decree are a mere pretext for impermissible discrimination.

Accordingly, the plaintiffs' motion for summary judgment is **denied**. The defendants' motion for summary judgment is **allowed**.

Appendix C.

BOSTON CHAPTER, NAACP, INC., et al.

v.

Nancy B. BEECHER, et al.

UNITED STATES of America

v.

CITY OF BOSTON et al.

Civ. A. Nos. 72-3060-F, 73-269-F.
United States District Court,
D. Massachusetts.
Feb. 8, 1974.
As Amended Feb. 11, 1974.

Decree

This case having come before the Court for a hearing on plaintiffs' motion for preliminary injunction and the parties having agreed pursuant to Federal Rule of Civil Procedure 65(a)(2) that the evidence presented on the testing issues should be considered as the evidence on the trial on the merits, and the Court having heard the testimony of the witnesses and the oral arguments of the parties for approximately five and one-half trial days, the Court having considered the oral and documentary evidence presented, the briefs and arguments of counsel, and having made findings of fact and conclusions of law, and being of the opinion that a decree should be entered; it is hereby ordered, adjudged and decreed:

[11] 1. The defendants City of Boston and Massachusetts Division of Civil Service and their officials, agents, employees,

and all persons in active concert or participation with them are enjoined from engaging in any act or practice which has the purpose or effect of discriminating against any applicant or potential applicant for employment with the Boston Fire Department or any other fire department in the Commonwealth subject to Civil Service law.

2. No further certifications or permanent appointments shall be made to the position of firefighter for the City of Boston or other cities and towns subject to Civil Service law on the basis of the list completed from the August 1971 firefighter examination unless done in compliance with the terms of this decree.

[12] 4. The Massachusetts Division of Civil Service shall cease using written firefighter entrance examinations of the type administered by the Division of Civil Service in August 1971, for the purpose of determining qualifications for the selection of firefighters. Should the Division of Civil Service desire to utilize entrance examinations in the future for the purpose of selecting firefighters, such examinations shall be demonstrably job-related and validated in accordance with the "Guidelines on Employees Selection Procedures" issued by the Equal Employment Opportunity Commission, 29 C.F.R. § 1607.1 et seq., or otherwise shown to have no discriminatory impact. If the parties disagree as to whether a written examination has been shown to be valid within the meaning of the Guidelines, the question of their validity and job relatedness shall be resolved by the Court, and such resolution, whether by the parties' agreement or by the Court, shall be accomplished before any such test is put into use for the purpose of qualifying or selecting. As with the instant study, the Court will scrutinize closely a future study which shows only a minimal level of job-relatedness.

[14] 7. Subsequent to obtaining the results of a valid examination, the defendant Director of the Massachusetts Division of

Civil Service, the defendants Massachusetts Civil Service Commissioners and their successors in office, shall promptly commence certifying firefighter applicants as eligible for appointment for each fire department subject to Civil Service. For each fire department a pool of eligible firefighter candidates shall be established and candidates certified in the following manner:

(a) Group A shall consist of all black and Spanish-surnamed applicants who failed any previous Fire Fighter Entrance Examination but passed the new valid examination and are otherwise qualified for appointment on the basis of existing requirements. Said candidates shall be ranked in accordance with existing Massachusetts law.

(b) Group B shall consist of all persons on the current eligibility list established on April 4, 1972. Said candidates shall be ranked in accordance with existing Massachusetts law except that any such persons who have been appointed to a fire department from said list on a provisional basis shall be listed first.

(c) Group C shall consist of all black and Spanish-surnamed persons, excluding those in Group A who shall pass the new valid examination and are otherwise qualified for appointment on the basis of existing requirements. Said candidates shall be ranked in accordance with existing Massachusetts law.

(d) Group D shall consist of all other persons, excluding those in Groups A, B and C, who pass the new valid examination and are otherwise qualified for appointment on the basis of existing requirements. Said persons shall be ranked in accordance with existing Massachusetts law.

8. In response to requisitions submitted by fire departments, candidates shall be certified to such departments on the basis of one candidate from Group A for every candidate certified from Group B until the list of candidates from Group A is exhausted.

9. Upon the exhaustion of Group A, candidates shall be certified to requisitioning fire departments on the following basis:

> (a) For the Cities of Boston and Springfield, one candidate from Group C for each candidate certified from Group B.
>
> (b) For all other cities and towns, one candidate from Group C for every 3 candidates certified from Group B, until the candidates from Groups B and C are exhausted.
>
> (c) If Group B is exhausted prior to Group C, candidates will be certified from Group D in accordance with the ratio established for Group B in paragraphs 8 and 9.

10. Should a candidate qualify to be placed in Groups A, B or C, after exhaustion of the Group for which he is eligible, said Group will be revived for purposes of affording the candidate the position he would have enjoyed.

11. Upon the exhaustion of Groups A, B and C, candidates shall be certified from Group D. Groups C and D shall expire in accordance with Massachusetts law.

12. The above hiring procedure shall apply to all future eligibility lists established subsequent to a valid firefighter entrance examination, and shall apply to all cities and towns subject to Civil Service law which have a minority popultion of 1% or more. Any new list established herein shall include a Group of all eligible blacks and Spanish-surnamed persons

(as in Group C) and a Group of all other eligible persons (as in Group D). Candidates shall be certified from each Group in accordance with the ratio established in paragraph 9. As a city or town achieves a complement of minorities commensurate with the percentage of minorities within the community, certifications will be made according to existing Massachusetts law.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA
Plaintiff

v. CIVIL ACTION
No. 73-269-F

CITY OF BOSTON, et. al.
Defendants

BOSTON CHAPTER, NAACP, et. al.
Plaintiffs

v. CIVIL ACTION
No. 72-3060-F

NANCY B. BEECHER, et. al.
Defendants

INTERIM CONSENT DECREE

This case having come on for a hearing before this Court in 1973, and the Court having entered an opinion and decree on February 8, 1974, and the Court of Appeals for the First Circuit having affirmed, and the defendants' petition for writ of certiorari to the Supreme Court of the United States having been denied, and in view of the extreme necessity that a new examination be administered, the parties consent to entry of this Interin Consent Decree to permit the administration of a new examination in accordance with the Decree of February 8, 1974. Wherefore, the parties agree that:

1. The defendant, Director of Civil Service, (hereinafter Director shall mean the Director, his successors, or after July 1,

1975, the Personnel Administrator] in implementing the February 8, 1974, Decree, shall administer a written test known as the IPMA B-1 (m) examination to all applicants for the fire service in cities and towns within the jurisdiction of Civil Service. This examination shall be administered only after defendants have satisfied the recruitment obligations imposed by paragraphs 5 and 6 of the Decree of February 8, 1974. The examination shall be given on or before July 31, 1975.

2. With regard to the validity of the IPMA B-1 (m) examination, the plaintiffs take no position as to the ultimate validity of IPMA B-1 (m) [hereinafter the "July Exam"] and agree to its use to establish an eligibility list for the certification of firefighters in Massachusetts for the sole purpose of implementing the Decree of February 8, 1974, subject to the conditions established by this Interim Consent Decree. Since the plaintiffs believe that the ranking of individuals on eligibility lists resulting from this test may have an adverse racial impact on Black and Spanish-surnamed persons the plaintiffs do not agree to the use of the results of this test for any purpose other than the implementation of the method and ratios of certification required by the February 8, 1974, Decree.

6. With respect to the administration of the July Exam, the cut-off score for determining which candidates have passed the Exam will be set by agreement of the parties. Any party may submit the question of the appropriate cut-off score to this Court for resolution. In any event, the cut-off score should be set so that the method and ratios of certification described in paragraphs 8 through 12 of the February 8, 1974, Decree can be implemented.

7. The Director shall notify the plaintiffs and supply evidence to the plaintiffs whenever a particular city or town has achieved a complement of Black and Spanish-surnamed firefighters commensurate with the percentage of minorities within the community or that the fire department is serving a city or town

with less than 1% Black and Spanish-surnamed population. The plaintiffs shall have thirty (30) days to object to the Director's notification. If such objection is not made within thirty (30) days, the particular city or town will no longer be subject to paragraphs 8-12 of the Decree of February 8, 1974, and certification to that city or town will be made according to existing Massachusetts law. Any disputes between the parties in this regard which cannot be resolved by the parties, will be resolved by this Court upon motion by any of the parties (Exhibit A, Fire Service under Civil Service, with racial compositions of each fire department as of Spring, 1975 has been furnished to the parties).

27. This Interim Consent Decree is in no way designed to lower the standard for certification of firefighters.

Consented to this 17th day of April, 1975.

THOMAS A. MELA Counsel for the NAACP	JOHN HURLEY Counsel for the Director pf Civil Service
PATRICK J. KING Counsel for the NAACP	MARC S. SEIGLE Consel for the Director of Civil Service
LINDA JAMIESON Counsel for the United States Department of Justice	THOMAS F. McKENNA Counsel for the City of Boston and the Boston Fire Commissioner

UNITED STATES OF AMERICA,
Plaintiff,

v.

CITY OF BOSTON, et al.,
Defendants,

BOSTON CHAPTER, NAACP, ET AL.,
Plaintiffs,

v.

NANCY B. BEECHER, ET AL.,
Defendants.

Civ. A. Nos. 73-269-F, 72-3060-F.
United States District Court,
D. Massachusetts.

Agreement to Effectuate Interim Consent Decree

This Court having approved and entered an Interim Consent Decree in this action on April 17, 1975, to allow a new firefighter entrance examination to be given, and said examination having been given, the parties consent to entry of this Agreement to permit the marking of said examination and the establishment of an eligibility list for the position of firefighter in the Commonwealth of Massachusetts.

WHEREFORE, the parties agree that:

11. No fire department which is currently subject to the minority preference required by Paragraphs 8-12 of the Decree of February 8, 1974, may be exempted from said Paragraphs unless the appointing authority has first petitioned the Division

that the percentage of post-probationary minority uniformed personnel equals the percentage of minorities in the city or town served by said department, and the parties have otherwise satisfied Paragraph 7 of the Interim Consent Decree.

12. The parties reserve all rights to move this Court to resolve any dispute under thie Agreement or the Interim Consent Decree.

Agreed to this day of , 1975.

THOMAS A. MELA Counsel for the NAACP	JOHN HURLEY Counsel for the Director pf Personnel Administration
PATRICK J. KING Counsel for the NAACP	MARC S. SEIGLE Counsel for the Director of Personnel Administration
LINDA JAMIESON Counsel for the United States Department of Justice	THOMAS F. McKENNA Counsel for the City of Boston and the Boston Fire Commissioner

Approved and entered by:

U.S. DISTRICT JUDGE

DATED: November 25, 1975

Appendix D.

UNITED STATES CONSTITUTION

AMENDMENTS

Amendment 14

(Adopted July 28, 1868)

SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Cross References —

Deprivation of due process by Federal government, see Fifth Amendment.

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Appendix E.

31:58 Municipal police officers and firefighters; qualification

Section 58. No person shall be ineligible for appointment and no person shall be denied employment as a firefighter or as a police officer in a city or town because of failure to attain a minimum height unless the administrator, in response to the written request of the appoint authority that no person under a specified height be certified for appointment to such position in said city or town, has established a minimum height requirement for the position. Such request shall include the findings of a validation study demonstrating the necessity for a minimum height for said position in said city or town, and such other evidence as the administrator may require.

A person shall be ineligible to become an applicant for an examination for original appointment to the position of firefighter or the position of police officer in a city or town if he will not have reached his nineteenth birthday or will have reached his thirty-second birthday on or before the final date for the filing of applications for such examination, as stated in the examination notice.

No applicant for examination for original appointment to the police force or fire force of a city or town shall be required by rule or otherwise to be a resident of such city or town at the time of filing application for such examination; provided, however, that notwithstanding the provisions of any general or special law to the contrary, any person who receives an appointment to the police force or fire force of a city or town shall within nine months after his appointment establish his residence within such city or town or at any other place in the commonwealth that is within ten miles of the perimeter of such city or town. If any person who has resided in a city or town for one year immediately prior to the date of examination for original appointment to the police force or fire force of

said city or town has the same standing on the eligible list established as the result of such examination as another person who has not so resided in said city or town, the administrator, when certifying names to the appointing authority for the police force or the fire force of said city or town, shall place the name of the person who has so resided ahead of the name of the person who has not so resided; provided, that upon written request of the appointing authority to the administrator, the administrator shall, when certifying names from said eligible list for original appointment to the police force or fire force of a city or town, place the names of all persons who have resided in said city or town for one year immediately prior to the date of examination ahead of the name of any person who has not so resided.

As a prerequisite to appointment to the position of regular police officer in a city, or in a town where the civil service law and rules are applicable to such position, a person shall have graduated from high school, or received a high school graduation equivalency certificate from the department of education, or served for three years or more in the armed forces of the United States, having last left such armed forces under honorable conditions.

Upon the written request of an appointing authority that educational requirements be established as prerequisites for appointment to its fire force, the administrator may establish such requirements.

(2)

No. 92-612

FILED
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In The

Supreme Court of the United States

October Term, 1992

LAWRENCE MACKIN, ET AL.,

Petitioners,

v.

CITY OF BOSTON, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF OF RESPONDENT BOSTON CHAPTER OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the District Court and the Court of Appeals for the First Circuit correctly found that the Boston Fire Department has not yet satisfied the conditions precedent to exemption from the affirmative action provisions of a judicial decree.

2. Whether the District Court and the Court of Appeals for the First Circuit correctly determined that the decree was narrowly tailored to remedy concededly discriminatory hiring practices.

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BRIEF OF RESPONDENT BOSTON CHAPTER OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Boston Chapter of the National Association for the Advancement of Colored People, Inc. ("NAACP"), respectfully requests that this Court deny the petition for writ of certiorari.

STATEMENT OF THE CASE

This case involves a collateral challenge to a judicial decree intended to remedy the racially discriminatory hiring practices of, *inter alia*, the Boston Fire Department ("BFD"). In 1972 and 1973, respondents NAACP and the United States brought separate actions challenging the discriminatory practices of both state and local officials in connection with the recruitment, examination and hiring of firefighters throughout the Commonwealth of Massachusetts. The actions were consolidated in the District Court before Judge Frank H. Freedman who held, after trial, that state civil service officials and numerous Massachusetts fire departments, including the BFD, had discriminated against black and Spanish-surnamed applicants in violation of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The District Court's decision is reported in *Boston Chapter, NAACP, Inc. v. Beecher*, 371 F. Supp. 507 (D. Mass. 1974).

Judge Freedman's conclusion was principally based on two factual findings. First, statistics demonstrated a gross disparity between the percentage of black and Spanish-surnamed people in the cities and towns that were subject to civil service laws and the percentage of such persons employed in the fire departments of those communities. For example, in the case of Boston, black and Spanish-surnamed persons made up approximately 23% of the population of the city, but only 0.9% of the firefighters in the Department. 371 F. Supp. at 514. Second, the District Court found that the test that Massachusetts civil service administrators had administered to

applicants for firefighter positions over the preceding two decades or more had not been prepared by professionals in psychological measurement or testing, and that only two of the numerous parts of the test were job-related, and those only marginally so. *Id.* at 511, 517. Petitioners in this case do not challenge the soundness of these findings. *See Mackin v. City of Boston*, 969 F.2d 1273, 1275 (1st Cir. 1992).

In prescribing a remedy for the effects of this history of racial discrimination, the District Court, among other things, decreed that the respondent state civil service administrators must certify, in response to requisitions by the Boston and Springfield fire departments, lists of qualified applicants of whom no less than half were to be black or Spanish-surnamed.[1] 371 F. Supp. at 522-23. A smaller proportion (twenty five percent) of black and Spanish-surnamed candidates was required for other cities and towns where the underrepresentation of minorities was found to be less severe. *Id.* Importantly, the decree never has required the BFD or any other department to *hire* any number or percentage of black or Spanish-surnamed applicants, but rather requires merely that the fire departments *consider* applicants from a pool in which minorities comprise a certain proportion. Each fire department, including the BFD, has retained the right to

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[1] To be considered "qualified," all applicants must pass a civil service examination that has been validated in accordance with regulations promulgated by the Equal Employment Opportunity Commission or otherwise has been shown to have no discriminatory impact. *Id.* at 521.

reject, or "bypass," any applicant as long as it provides a job-related reason for doing so.

The decree also specifies that each municipality subject to its provisions may petition for exemption when it "achieves a complement of minorities [in its fire department] commensurate with the percentage of minorities within the community." *Id.* at 523. Thus the duration of the affirmative action provisions of the decree is largely within the control of the local officials responsible for the recruitment and appointment of firefighters.

The defendants in *Beecher* appealed Judge Freedman's ruling, but a unanimous Court of Appeals affirmed, approving the decree in its entirety. *See Boston Chapter N.A.A.C.P., Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974)(Campbell, J.). The Court of Appeals carefully evaluated the decree and noted, among other things, that "[i]n no case must any unqualified minority person be appointed; if no qualified applicants are available, none will be appointed." *Id.* at 1027. The Court of Appeals specifically found that "[t]he relief goes no further than to eliminate the lingering effects of previous practices that bore more heavily than was warranted on minorities" and that the decree was "carefully limited in extent and duration." *Id.* This Court denied review of the decision by the Court of Appeals. 421 U.S. 910 (1975).

Since the decree was entered, over half of the Massachusetts fire departments initially subject to the decree have attained exemption from its provisions governing composition of the eligibility pool by achieving minority representation at or exceeding the minority population of the relevant community. *See* Petition for Writ of Certiorari

("Petition") at 9. The BFD itself has not yet requested exemption because the complement of minorities on its force is not yet commensurate with the percentage of minorities in Boston.[2] The BFD's failure to achieve parity is largely due to the fact that in actual hiring the BFD has historically "bypassed" (that is, rejected) a disproportionate number of minority candidates certified as eligible by state civil service officials.

Petitioners, white candidates for employment as firefighters, filed this action on September 14, 1989, challenging the continued application to the BFD of the certification ratios set forth in Judge Freedman's 1974 decree. As summarized in the opinions of the District Court and Court of Appeals for the First Circuit (reprinted at pages 1a through 30a of the Appendix), petitioners contend that the conditions for exemption from the affirmative action provisions of the decree have been met by the BFD and that therefore any preferential consideration of minority applicants unlawfully discriminates against petitioners on the basis of race in violation of the Equal Protection Clause and 42 U.S.C. § 2000e.

Petitioners' claims were resolved against them in rulings on cross motions for summary judgment filed by all of the parties. At the outset, petitioners based their claim

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[2] As of November 1, 1990, minorities comprised 23.6% of the tenured members of the BFD. Appendix to the Petition for Writ of Certiorari ("Appendix") 23a. According to the 1990 federal census, minorities comprised 29.72% of those who were aged 18 and over at the time of that census. Appendix 19a.

that the BFD had attained parity, thus requiring exemption from the decree, on the contention that the percentage of black and Spanish-surnamed firefighters in the BFD at the time they instituted suit exceeded the percentage of black and Spanish-surnamed persons in the population of Boston at the time the decree was entered in 1974. The District Court rejected this anomalous interpretation of the decree, finding that parity is a condition to be assessed by reference to the *present* population of Boston, not its population in 1974. Using 1980 census statistics, the District Court held that as of June 1991 parity had not yet been achieved.[3] Appendix 23a-24a.

Judge Skinner also rejected petitioners' contention that the decree itself was invalid. Applying the most recent Supreme Court precedents, he held that Judge Freedman's findings justified the remedial provisions of the decree and rejected petitioners' assertion that the decree was not narrowly tailored to achieve its remedial purpose. Appendix 25a-30a.

Petitioners immediately filed a motion for reconsideration, asserting for the first time that compliance with the decree should be measured by reference to the percentage of minorities in the more limited labor pool rather than the percentage of minorities in the general population.[4] They also changed their position with respect to the use of contemporary census figures,

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[3] The parties' cross motions for summary judgment had been filed in early 1991, before the results of the 1990 federal census had been published. Appendix 19a.

[4] Massachusetts law requires that firefighter candidates be at least 19 years of age. *See* Mass. Gen. Laws c. 31, § 58.

although they advanced as determinative data from the 1980 census despite the recent publication of the 1990 census. Petitioners further asserted for the first time in their motion papers (and without supporting argument or citation) that the class of persons whose injuries were remedied by the decree should be subdivided into separate classes of blacks, on the one hand, and Spanish-surnamed persons, on the other. The District Court denied the motion for reconsideration, noting that even if it considered the more limited labor pool of black and Spanish-surnamed persons over age 18, the newly-available 1990 census data showed that the BFD had not yet achieved the parity required for exemption from the decree. Appendix 19a.

On appeal, the Court of Appeals for the First Circuit unanimously affirmed the District Court in all respects. *Mackin v. City of Boston*, 969 F.2d 1273 (1st Cir. 1992). Petitioners now seek review in this Court.

REASONS FOR DENYING THE WRIT

The thorough analysis of the Court of Appeals, and the careful decisions of the District Court it affirms, faithfully apply the opinions of this Court. The lower courts neither faced nor resolved any novel issue of law. Indeed, petitioners have not identified a single deviation between the decisions below and those of any other court, state or federal. In short, none of the considerations favoring a grant of certiorari set forth in Supreme Court Rule 10 are present here.

Furthermore, the essence of petitioners' case, and of their petition to this Court, is factual: has the BFD in fact satisfied the conditions of a federal court decree? The material facts of this case were resolved against petitioners by the unanimous courts below in decisions carefully grounded in the record. Petitioners' dissatisfaction with those decisions does not provide reason for review by this Court. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is . . . cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error"); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts").

Accordingly, the petition for a writ of certiorari should be denied.

I. THE COURTS BELOW CORRECTLY FOUND AS A FACTUAL MATTER THAT THE BFD HAS NOT SATISFIED THE CONDITIONS FOR EXEMPTION FROM THE DECREE.

A. The Lower Courts Correctly Held That Compliance With The Decree Is To Be Determined By Reference To Contemporary Population Statistics.

In their motion for summary judgment, petitioners initially contended that the BFD had achieved exemption from the decree because the percentage of black and Spanish-surnamed firefighters in the BFD in 1990 exceeded the percentage of black and Spanish-surnamed

persons in the population of Boston in 1974, when the decree issued. Both the District Court and the Court of Appeals properly rejected this theory and held that the language of the decree, the longstanding practice of all parties subject to its provisions, and common sense clearly required the use of contemporary population figures in the assessment of parity. *See* 969 F.2d 1273, 1276-77; Appendix 24a.

Judge Selya's analysis for the Court of Appeals is equally dispositive of petitioners' fall-back position, asserted in their petition to this Court, that the relevant measure of compliance under the decree is the black and Spanish-surnamed population of Boston as of 1980, a year having no special significance to the events at issue in this case. Petition at 6-7. Petitioners have advanced no reason to disregard Judge Selya's admonition that "[o]ne implication of recent Supreme Court school desegregation decisions is that federal courts, at least in the mine-run of civil rights and constitutional reform cases, have no choice but to make decisions about the maintenance, modification, or dissolution of structural remedial orders by referring to the most current population statistics available." 969 F.2d at 1276-77. This lesson is underscored by the recent decisions of this Court that emphasize the importance of flexibility in assessing existing decrees under changing conditions. *See generally Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 758 (1992). In measuring compliance by the most recently available statistics, namely, the 1990 census data, the courts below followed the lead not only of this Court but also of other federal courts that have utilized contemporary census data to

measure satisfaction of the goals of judicial decrees affecting the hiring of public safety officers. *See, e.g., United States v. City of Buffalo*, 721 F. Supp. 463, 467 & n.8 (W.D.N.Y. 1989).

B. The Lower Courts Correctly Found That The BFD Has Not Attained Parity On Any Theory Advanced By Petitioners.

Shifting gears from their original motion for summary judgment, petitioners asserted in their motion for reconsideration by the District Court that parity should be determined by reference to the percentage of minorities in the Boston population who are aged 18 and over, as opposed to the percentage of minorities in the entire Boston population. Both courts below found, as a factual matter, however, that this contention yielded no different result for petitioners.

As the District Court held in ruling on petitioners' motion for reconsideration, using data from the 1990 census, the percentage of black and Spanish-surnamed persons in the labor pool identified by petitioners substantially exceeds the percentage of minorities employed as firefighters in the BFD.[5] Further, even utilizing the 1980 census data (as urged by petitioners), the Court of Appeals found that when properly measured, the percentage of minorities in the Boston labor pool still

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[5] In a fire department the size of Boston's, the difference of only six percentage points may mean ninety or more firefighters. *See Boston Chapter, NAACP, Inc. v. Beecher*, 371 F. Supp. at 514.

exceeded the percentage of minority firefighters in the BFD. As Judge Selya noted, the Boston labor pool at the time this suit was instituted in 1989 included all persons who were ten years old or older in 1980 rather than only those who were 19 at the time of the 1980 census. Evaluated by reference to the correct data, "a continuing lack of parity in the [BFD] is statistically evident." 969 F.2d at 1279.[6]

II. THE LOWER COURTS CORRECTLY CONCLUDED THAT THE DECREE WAS NARROWLY TAILORED TO ACHIEVE ITS REMEDIAL PURPOSE.

The Court of Appeals correctly held that the decree withstood petitioners' constitutional challenge "with flying colors." 969 F.2d at 1278. Following the decisions of

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[6] In their motion for reconsideration petitioners asserted yet another wholly new basis upon which they urged that parity be found. By subdividing the class of minorities intended to be benefited by the decree into separate classes of blacks and Spanish-surnamed persons, petitioners argued that the remedial provisions of the decree should be lifted for blacks, a position adverted to in passing in their petition to this Court. Petition at 7. As the Court of Appeals correctly held, the District Court did not abuse its discretion in refusing to consider this argument, which could have been raised from the outset of suit. 969 F.2d at 1279. Moreover, in addition to the absence of factual support for petitioners' claim of "partial parity," the Court of Appeals found that their approach "clearly contradicts the format of the original litigation, which constituted combined classes of black and Spanish-surnamed persons, not separate classes [and] also contradicts the clear intent of the decree and an unbroken skein of preexisting practice under the decree's terms." *Id.*

this Court, it noted that, in evaluating the decree, a significant measure of deference is owed to the District Court. 969 F.2d at 1277. This is so because the District Court "has first hand experience with the parties and is best qualified to deal with the 'flinty, intractable realities of day-to-day implementation of constitutional commands.'" *United States v. Paradise*, 480 U.S. 149, 184 (1987) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 6 (1971)).

The Court of Appeals properly proceeded to test the decree along each of the various dimensions mandated by this Court. It noted that the decree does not give undue advantage to minority applicants. All applicants, including minorities, must pass a qualifying examination. Moreover, the decree only affects the composition of the pool of eligible candidates; it does not mandate who must be *hired*. As the Court of Appeals correctly found, "the decree gives only a limited advantage, not a guarantee of employment, to minority applicants." 969 F.2d at 1298, *citing Johnson v. Transportation Agency*, 480 U.S. 616, 638 (1987).

Second, the Court of Appeals correctly held that any "failure" on the part of the BFD to hire petitioners "disturbs no legitimate, firmly-rooted expectations on the part of those applicants." 969 F.2d at 1278. Petitioners' contention that the decree "trammels" their rights flies in the face of the undisputed facts. As both lower courts found, there were many other white applicants who had perfect test scores and many other applicants with lower scores but with statutory preferences that ranked them ahead of even those with perfect scores, all competing for

relatively few available positions.[7] It is simply not true that petitioners were "passed over" on account of race, since "irrespective of the decree, [petitioners] could not reasonably have felt assured that they would be appointed." 969 F.2d at 1278. *Cf. Wygant v. Jackson Board of Education*, 476 U.S. 267, 282-83 (1986) ("Denial of a future employment opportunity is not as intrusive as loss of an existing job").

Further, as the Court of Appeals accurately observed, the decree's affirmative action provisions have only a limited life, expiring by their own terms as the requirement of parity between the percentage of minorities in the population and the percentage of minorities in the fire department is met by each community that is subject to those provisions. 969 F.2d at 1278. As Judge Skinner found, "[o]f the fifty eight communities initially subject to the court decree, thirty four have reached 'parity' and have been exempted from the decree." Appendix 23a. The expiration of the decree under its own terms with respect to the majority of other fire departments demonstrates that it was, and remains, narrowly tailored. *Cf. Paradise*, 480 U.S. at 178-79 (noting that the effectiveness and flexibility of a hiring order was demonstrated by its partial suspension after decree first issued). The BFD's own inability – in contrast to the majority of Massachusetts

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[7] The statutory preferences include firefighters laid off from other departments, veterans, and children of firefighters and policemen who were killed or rendered disabled in the line of duty. *See* Mass. Gen. Laws c. 31, §§ 26, 40. Despite the small number of available positions, however, during the pendency of this litigation about one third of the petitioners were in fact appointed to the BFD.

fire departments – to achieve parity is the result of its own recruitment and hiring practices, practices that are largely unaffected by the decree.

In challenging the validity of the decree, petitioners have never claimed that it was not sufficiently justified by findings of discrimination or not sufficiently narrowly tailored to achieve its remedial purpose when it was entered. At most, they appear to be arguing that the "great strides" made by the BFD and the use of a "validated" civil service entrance exam justify exemption or indicate that there is no longer a basis for issuing the decree in the first place.[8] There is no reason, however, to dissolve this remedial decree or excuse full compliance with its terms simply because the BFD may have made progress towards the goal of the decree. Moreover, compliance with the decree does not retroactively nullify the undisputed findings of discrimination that justified its entry. *See United States v. City of Buffalo*, 721 F. Supp. at 467 ("No new finding of discrimination is necessary" where terms of race-conscious remedial decree not yet fully satisfied). Petitioners' apparent reliance on *City of Richmond v. J.A. Croson Company*, 488 U.S. 465 (1989), and *Wygant v. Jackson Board of Education, supra*, is simply misplaced, for there is no dispute that the District Court entered the remedial, race conscious decree on the basis

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[8] Contrary to petitioners' assertions, it is not true that firefighter candidates are now administered a validated exam. *See* Appendix 27a-28a. In any event, the courts below did not resolve this issue because they correctly concluded that it was immaterial. 969 F.2d at 1277 & n.3; Appendix 28a.

of firm and specific evidence of the BFD's history of racially discriminatory practices.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari does not present any question warranting this Court's review, and the Court should deny the petition.

Respectfully submitted,

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No. 92-612

In the Supreme Court of the United States.

October Term, 1992

LAWRENCE MACKIN, et al.,
Petitioners,

v.

CITY OF BOSTON, et al.,
Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for
the First Circuit

BRIEF IN OPPOSITION OF MASSACHUSETTS PERSONNEL ADMINISTRATOR

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The petitioners have set forth the following question presented:

QUESTION PRESENTED

Did the Court of Appeals for the First Circuit improperly apply the holdings of the United States Supreme Court in Wygant v. Jackson Board of Education, 476 U.S. 267 (1986); City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) and United States v. Paradise, 480 U.S. 149 (1987) when finding that the hiring practices under a 1974 consent decree by the City of Boston were constitutionally permissible when providing race-based relief over higher-scoring white persons?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are listed in the Petition for Certiorari. This brief in opposition is submitted by the state respondent, the Massachusetts Personnel Administrator.

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Pursuant to Supreme Court Rule 15, the respondent Massachusetts Personnel Administrator submits this brief in opposition to the Petition for Writ of Certiorari filed in this case.

DECISION BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 969 F.2d 1273 (1st Cir. 1992). See Appendix A to Petition for Writ of Certiorari, pp. 1a-15a.[1/] The decision of the United States District Court for the District of Massachusetts was not reported. App. 16a-30a.

1/ References to the Appendix to the Petition for Writ of Certiorari will hereafter be designated "App. [page #]".

RELEVANT CONSTITUTIONAL PROVISION

The Equal Protection Clause of the Fourteenth Amendment to the Constitution states that "[N]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioners are white applicants for entry level positions in the respondent Boston Fire Department (the "Department" or "BFD"). They contend that the Department has contravened their rights under the Equal Protection Clause of the Fourteenth Amendment by hiring firefighters in accordance with a remedial order entered in Boston Chapter, NAACP, Inc. v. Beecher, 371 F.

Supp. 507 (D. Mass. 1974), aff'd, 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975) (hereafter the "Beecher decree" or the "decree"). App. 31a-40a. Petitioners also contend that the respondent Massachusetts Personnel Administrator (the "Personnel Administrator") has violated their rights under the Equal Protection Clause by certifying to the BFD, in the exercise of his authority under Massachusetts civil service law, a list of firefighter applicants in accordance with the Beecher decree.

Proceedings in the Beecher case

In 1972, representatives of a class of unsuccessful black and Hispanic applicants for firefighters positions

throughout the Commonwealth of Massachusetts commenced an action against the City of Boston, its Fire Commissioner and the members of the Massachusetts Civil Service Commission. Boston Chapter, NAACP, Inc., et al. v. Nancy B. Beecher, et al., 371 F. Supp. 507 (D. Mass. 1974). The plaintiffs claimed racial discrimination in violation of 42 U.S.C. §§ 1981 and 1983 in connection with recruitment and certification practices established by the Massachusetts Civil Service Commission and implemented by the BFD and other municipal fire departments across Massachusetts. 371 F. Supp. at 509-510. In 1973, the Attorney General of the United States brought an action raising similar claims, together with

claims under Title VII, 42 U.S.C. § 2000e et seq. United States v. City of Boston, et al., C.A. No. 73-269-F. The two actions were consolidated. Id. at 510.[2/]

Following evidentiary hearings, the District Court found that blacks represented approximately 16% of Boston's population, that the combined minority population of Boston was 23% of the total and that blacks and Hispanics represented only 0.9% of the

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2/ The opinions of the District Court and the Court of Appeals describe in detail the proceedings in the consolidated action. See Boston Chapter, NAACP, Inc. v. Beecher, 371 F. Supp. 507 (D. Mass. 1974), aff'd, 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975).

Department's sworn personnel. Id. at 514. The Court found, as evidenced by the "insignificant" number of blacks and Hispanics certified, that the civil service examinations administered from 1968 through August 1971 to applicants for entry level firefighter positions were discriminatory. It also found that the BFD's word-of-mouth recruitment policy resulted in unintentional racial discrimination. Id. at 510, 515, 519-20.

In February 1974, the District Court ordered a program of active recruitment of minority firefighters, enjoined further certification based upon the results of the discriminatory examinations, ordered development of a job-related examination, and required preferential certification of black and

Hispanic applicants. Id. at 520-23.[3/] It also ordered that these remedial measures remain in force for any city or town with a minority population greater than 1% until its fire department "achieves a complement of minorities commensurate with the percentage of minorities within the community". Id. at 523. The Court of Appeals for the First Circuit affirmed. Boston Chapter,

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3/ The preferential certification procedure first required the establishment of an eligible list of candidates who had passed the firefighters examination and met the other eligibility requirements for the position. The decree then stipulated that the list consist of one minority candidate (i.e. black or Spanish-surnamed) for each white candidate, until the group of qualified minority applicants was exhausted. See App. 5a (note 2), 33a-35a.

NAACP, Inc. v. Beecher, et al., 504 F.2d 1017 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975).

In the years since the entry of the Beecher decree, substantially increased numbers of black and Hispanic persons have been appointed to firefighter positions in municipalities across Massachusetts. As a result, thirty-four fire departments that originally were subject to the decree have been exempted from its preferential certification requirements by reason of their appointment of minorities in numbers commensurate with the minority population in the respective communities, as based on the most recent federal census. Record Appendix,

pp. 96, 197.[4/] There are currently twenty-four municipal fire departments, including the BFD, that remain subject to the decree. R.A. 96.

The Mackin case

The present case was filed in September 1989. Petitioners are white male applicants for firefighter positions in the City of Boston who took the firefighters examination on December 7, 1987 and received a score of 100%. R.A. 57. Each alleges that he was otherwise qualified for the position of firefighter, but was "passed over for

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[4/] References to the Record Appendix which was filed with the petitioners' brief in the Court of Appeals will hereafter be designated "R.A. [page #]".

appointment" because the Personnel Administrator, following the Beecher decree, certified a list of eligible candidates that placed certain black and Spanish-surnamed applicants ahead of the petitioners on the list, although their scores were lower than petitioners' scores. R.A. 57. In their Amended Complaint, petitioners alleged that the Personnel Administrator's adherence to the Beecher decree violates the Equal Protection Clause and Title VII of the Civil Rights Act of 1964. R.A. 58-60, 63-64. Petitioners also alleged that the goals of the Beecher decree have been met and, therefore, that the defendants may no longer implement its

minority preference requirements. R.A. 61-62.[5/]

Motions for summary judgment were filed by all parties. The District Court granted summary judgment for the respondents, finding that the Beecher decree does not violate the Equal Protection Clause or Title VII and that the BFD has not yet satified the terms of the decree. App. 20a-30a. The Court of Appeals for the First Circuit

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5/ After the present case was filed, ten of the thirty-five petitioners were appointed to entry-level positions in the BFD in April 1990. R.A. 195. Two other petitioners were offered appointments in April 1990; one of them rejected the opportunity and the other failed the medical examination. R.A. 196.

affirmed. 969 F.2d 1273 (1st Cir. 1992). App. 1a-15a.

REASONS FOR DENYING THE WRIT

This petition does not present a question of "such gravity and general importance" as to warrant review by this Court. In re Woods, 143 U.S. 202, 206 (1892). Petitioners do not contend that the decision below conflicts with that of any other court of appeals, or that the lower court announced a rule of law at variance with decisions of this Court. No important issue of federal law is raised in the petition which would warrant plenary review by this Court.

I. THE PETITION RAISES ONLY QUESTIONS OF FACT AND OF THE INTERPRETATION OF A PRIOR JUDICIAL DECREE UNIQUE TO THIS CASE.

The petition challenges nothing more than the lower court's interpretation of those provisions of the Beecher decree that address: (i) how, under the decree, it is determined that a fire department has met the decree's minority hiring goal, such that minority applicants are no longer granted preferential standing on the eligibility list, and (ii) whether minority preferences continue under the decree until the decree's hiring goal is met, if the Personnel Administrator has developed a firefighters examination that is valid under Equal Employment Opportunity Commission ("EEOC") guidelines. Petitioners also challenge the Court of

Appeals' conclusion that the evidence does not warrant the BFD's release from the decree.[6/]

Petitioners nowhere establish that the issues they raise are unsettled, recurring or of broad impact. The alleged "error" in the decision below has no importance of any kind beyond the particular facts of this case and the parties involved here. For these

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6/ In this regard, petitioners recite as "presumed to be true" facts that are directly contrary to those found by the District Court. Petition, p. 9. For example, petitioners claim that Boston had a black population of 18.7% when their suit was filed in 1989. Id. In fact, the District Court found that, in 1980, 22.4% of Boston's population was black and, in 1990, 29.72% of Boston's population over age 18 was black. App. 19a, 24a.

reasons, the petition should be denied. See General Pictures Co. v. General Electric Co., 304 U.S. 175, 178 (1938) ("Granting the writ would not be warranted merely to review the evidence or inferences drawn from it.").

In any event, petitioners' objections to the Court of Appeals' analysis are without merit. As the Court correctly held, the plain language of the decree, the past practice of the parties under the decree and common sense refute the petitioners' contention that the decree's hiring goal should be determined with reference to the minority population of Boston in 1974, when the decree was entered, rather than

with reference to current population figures. App. 8a-10a.[7]

Petitioners' contention that the hiring goals in the Beecher decree must be construed to refer to the minority percentage of what they call the "relevant labor pool" (i.e. persons age 19 and older),[8] and not the percentage of minorities in the community, is of no

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[7] The Court of Appeals also found this approach to be consistent with this Court's use of current population statistics in examining questions of compliance with school desegregation decrees. App. 9a-10a. See e.g., Freeman v. Pitts, 112 S.Ct. 1430, 1437-38 (1992).

[8] Massachusetts law requires a person to be 19 years of age to take the firefighters examination. Mass. Gen. Laws c. 31, § 58.

moment in this case. As the District Court and the Court of Appeals both held, even by this reference, the Department has not met the decree's hiring goals. App. 15a, 19a.

Petitioners also contend that the preferential certification requirements of the Beecher decree ended upon the administration of a validated firefighters examination. Petition, pp. 10, 11, 13. As the Court of Appeals held, the language of the decree does not support this view. The decree states that the preferential certification procedure "shall apply to all future eligibility lists established subsequent to a valid firefighter entrance examination." App. 10a, 34a. (emphasis added). Thus, the lower court

found that, under the decree, "validated examinations are not an end in themselves, but merely a means toward achieving the decree's actual objective: rough parity (to remedy the effects of past discrimination)." App. 10a.[9/]

[9/] For the same reason, the Court of Appeals correctly determined that the dispute among the parties as to whether the firefighters examination is valid is not material to whether preferential certification of minority applicants continues under the decree. App. 10a, n. 3. Nonetheless, petitioners ask this Court to accept their assertions on this disputed issue of fact. Petition, pp. 9, 14, 15. Certiorari review is not, however, appropriate for the determination of factual issues not passed on by the courts below. See United States v. Johnson, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts.").

II. THE DECISION BELOW IS CONSISTENT WITH DECISIONS OF THIS COURT.

In City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989), a majority of the Court agreed that race-based preferences must be reviewed under a standard of strict scrutiny when challenged as violative of the Equal Protection Clause of the Fourteenth Amendment. Id. at 494 (plurality); id. at 519 (Kennedy, J., concurring in part and concurring in the judgment). To meet this standard, race-conscious judicial relief must be justified by "a compelling interest", id. at 505, and be "narrowly tailored" to further that interest. Id. at 507-508. See United States v. Paradise, 480 U.S. 149, 167 (1987) (plurality) (setting out two-part strict scrutiny test). Remedying

identified past discrimination constitutes a compelling state interest and is therefore a sufficient predicate for ameliorative race-based preferences. Croson, 488 U.S. at 500-505; Paradise, 480 U.S. at 167 (plurality); Wygant v. Jackson Board of Education, 476 U.S. 267, 274 (1986) (plurality).

The foregoing principles were carefully applied by the Court of Appeals in reviewing the Beecher decree. App. 6a-8a, 11a-13a.[10/]

10/ In addition, the Court of Appeals correctly noted that district courts should be flexible in considering requests for release from decrees entered in institutional reform litigation. App. 7a, citing Rufo v. Inmates of Suffolk County Jail, 112 S.Ct. 748, 760 (1992). The Court also

(Footnote continued on next page.)

Petitioners do not urge that a different standard was applicable. Rather, without raising one or more discrete issues for review, petitioners broadly contend that the lower court "improperly" applied the decisions of this Court cited above in rejecting their challenge to the Beecher decree. Petition, pp. 8-15. These general claims are both inappropriate for certiorari review and without merit.

(Footnote continued from previous page.)

noted that federalism concerns must inform its review of the Beecher decree, stating "that the 'legal justification for displacement of local authority . . . is a violation of the Constitution by the local authorities'". App. 7a, quoting Board of Education of Oklahoma City Public Schools v. Dowell, 111 S.Ct. 630, 636-637 (1991).

In Croson, this Court rejected the City of Richmond's use of a minority set-aside program in awarding construction contracts which was not justified by "identified" past discrimination in the local construction industry. 488 U.S. at 498-506. Similarly, in Wygant v. Jackson Board of Education, 476 U.S. 267, 274-276 (1986), a plurality of this Court found a general claim of "societal discrimination" to be an insufficient predicate for race-based teacher layoffs. In the present case, however, specific findings of discrimination were made, after evidentiary hearings, in the Beecher case which served as the factual predicate for the remedial decree. Petitioners do not challenge these

findings. See App. 7a ("In this case, appellants do not argue that the original finding of discrimination was flawed.") Consequently, petitioners cannot legitimately complain that the decision below departs from this Court's holdings in Croson and Wygant.

Petitioners also argue that the Beecher decree is not "narrowly tailored". See United States v. Paradise, 480 U.S. at 171. In doing so, however, they mischaracterize the decree as containing racial "quotas". Petition, p. 11. In fact, as the Court of Appeals found, "the decree does not require that minority aspirants be appointed." App 12a. Rather, it provides only that the eligiblity lists from which applicants are selected

(which must contain only the names of applicants who have passed the entrance examination and are otherwise qualified) shall have one minority applicant for each white applicant. App. 5a (note 2). Thus, the decree provides a mechanism which insures adequate representation of qualified minorities in the pool from which appointments are made; it does not mandate the selection of a particular number of minority candidates. App 12a, 31a-35a. The preferential certification procedure is also time-limited, and terminates when a fire department "achieves a complement of minorities commensurate with the

percentage of minorities within the community". App. 35a.[11/]

In view of the foregoing, the Court of Appeals correctly found that "the decree gives only a limited advantage, not a guarantee of employment, to minority applicants", and is "tailored with sufficient precision" to pass constitutional muster. App. 13a. Cf. Johnson v. Transportation Agency, 480 U.S. 616, 638 (1987) (approving affirmative action plan that did not mandate quota hiring, but "merely

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11/ Under this provision, a substantial majority of the fire departments that originally were subject to the Beecher decree have been released from its preferential certification requirements. R.A. 96.

authorize[d] that consideration be given to affirmative action concerns when evaluating qualified applicants").

Finally, petitioners assert that a non-discriminatory examination has been given and the BFD has made "tremendous strides" in remedying the effects of past discrimination. They argue, therefore, that there is no legitimate reason for the decree to have continuing effect. Petition, pp. 10-11, 13-15. It is true that the equitable power of the federal courts may be used only where necessary to remedy a violation of federal law or the constitution. Board of Education of Oklahoma City Public Schools v. Dowell, 111 S. Ct. 630, 637 (1991). However, petitioners' claim in this regard is again grounded in the particular facts of this case, rather

than any issue of general importance. The lower courts both found that the BFD has not achieved, even substantially, the decree's minority hiring objective, which is the benchmark by which to determine whether past discrimination has been remedied. See App. 10a, 12a, 15a, 23a-24a. Because the decree continues to serve a remedial purpose with respect to past discrimination, the petitioners' challenge was correctly rejected below. United States v. Paradise, 480 U.S. at 167.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

PERSONNEL ADMINISTRATOR OF THE
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No. 92-612

In the Supreme Court of the United States

OCTOBER TERM, 1992

LAWRENCE MACKIN, ET AL., PETITIONERS

v.

CITY OF BOSTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding that the Boston Fire Department should not be released from the terms of a remedial decree requiring race-conscious hiring practices, because the Department had not met the terms of the decree.

2. Whether the court of appeals erred in concluding that the decree is narrowly tailored to serve a compelling state interest.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 969 F.2d 1273. The orders of the district court (Pet. App. 18a-30a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1992. The petition for a writ of certiorari was filed on October 5, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are 35 white applicants for the position of firefighter in the City of Boston. They brought this action to challenge the continued validity of a remedial decree governing the hiring processes of respondent Boston Fire Department, claiming that the decree and the Department's hiring practices under it discriminated against them on the basis of their race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment. The district court concluded that the decree was lawful, and that its remedial purposes had not yet been achieved. Accordingly, it granted summary judgment against petitioners. The court of appeals affirmed. Pet. App. 1a-15a.

1. a. In 1972, the Boston Chapter of the NAACP filed suit on behalf of black and Spanish-surnamed individuals against the City of Boston, its Fire Commissioner, and Massachusetts Civil Service officials, alleging that the hiring practices of fire departments throughout the Commonwealth of Massachusetts discriminated against minorities in violation of Title VII, the Fourteenth Amendment, and 42 U.S.C. 1981 and 1983. Pet. App. 4a, 21a-22a. In 1973, the United States filed a similar action, alleging that the Boston Fire Department impermissibly used an entry-level examination that had an unlawful adverse impact on minority applicants. *Ibid.* The district court consolidated the two actions. *Id.* at 4a.

Following trial, the district court concluded that the defendants, including the Boston Fire Department, unlawfully discriminated against black and Spanish-surnamed applicants by requiring them to take "a non-job related examination which ha[d] an

adverse racial impact on blacks and Spanish-surnamed persons." *Boston Chapter, NAACP, Inc.* v. *Beecher*, 371 F. Supp. 507, 519 (D. Mass. 1974). The district court entered a remedial decree enjoining any further use of eligibility lists based upon such examinations, ordering the Commonwealth to develop a nondiscriminatory job-related entry-level examination, and requiring that qualified black and Spanish-surnamed applicants receive preferential certification.[1] The decree required a one-to-one certification ratio (*i.e.*, one minority candidate for each non-minority candidate)[2] for applicants to the Commonwealth's fire departments, and provided that those procedures would remain in effect for each fire department subject to the decree until it achieved a "complement of minorities commensurate with the percentage of minorities within the community." *Id.* at 523.[3]

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[1] The remedial decree, and the consent decrees that were entered in order to effectuate it, are reprinted in the court of appeals appendix. See C.A. App. 99-106. Like the court of appeals, we will focus herein on the remedial decree, because its terms are the object of petitioners' complaints. See Pet. App. 5a.

[2] Not all jurisdictions subject to the decree were required to impose a one-to-one certification ratio. Rather, the certification ratio for each jurisdiction depended on the degree of the disparity between the minority representation in a city's fire department and the community.

[3] The decree preserved, however, the practice of giving preferential hiring status to applicants who are veterans, relatives of deceased or disabled firefighters, or unemployed firefighters who have been laid off from a fire department in the region. Those preferences generally reflect the requirements of state law. See Mass. Gen. Laws Ann. ch. 31, §§ 26, 40 (West 1983 & Supp. 1992).

b. The court of appeals affirmed, holding that the remedy imposed by the district court was not unlawful. *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d 1017, 1027 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975). The court agreed with the district court's finding of discrimination in hiring, and approved the race-conscious relief ordered as a remedy because it went "no further than to eliminate the lingering effects of previous practices that bore more heavily than was warranted on minorities," and was "carefully limited in extent and duration." *Ibid.* The court of appeals noted that the "decree remains in force, for each local fire department, until that department attains sufficient minority fire fighters to have a percentage on the force approximately equal to the percentage of minorities in the locality." *Ibid.*[4]

2. Petitioners filed the present action in September 1989.[5] They alleged primarily that the Boston Fire Department had complied with the decree by achieving statistical parity between the percentage of minority firefighters and the percentage of minorities in the Boston population, and should not remain bound to follow the race-conscious hiring practices mandated

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[4] An interim consent decree approved and entered by the district court in 1975 provided that no fire department may be exempted until "the percentage of post-probationary minority uniform personnel equals the percentage of minorities in the city or town served by said department." C.A. App. 106.

[5] The amended complaint named as defendants the City of Boston, its mayor, and certain individuals responsible for administering the personnel affairs of the Department. The United States later filed a motion to consolidate petitioners' action with the *Beecher* litigation. The district court granted that motion on August 28, 1990. C.A. App. 3.

by the decree.[6] Petitioners also claimed that the current written entry-level examination used by the Department is job-related and has no adverse impact on minorities. Pet. App. 5a-6a, 23a-24a, 29a. Finally, petitioners claimed that the decree was unlawful because it caused them to be denied employment solely on the basis of their race. *Id.* at 4a-5a, 20a.

On cross-motions for summary judgment, the district court concluded that the remedial goals of the decree had not been met, and accordingly refused to release the Department from the decree. Pet. App. 30a. The court rejected petitioners' claim that the relevant statistics for determining whether the decree's goal of work force parity had been reached were 1970 population figures.[7] According to the 1980 federal census, the Department has "not reached parity within the terms of the decree," because the minority population in Boston exceeded the current percentage of minorities in the Department. *Id.* at 24a.

The district court concluded (Pet. App. 25a-29a) that the imposition of race-conscious relief in 1974 was constitutionally permissible under the strict scrutiny mandated by this Court's decisions. See, *e.g.*, *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989); *United States* v. *Paradise*, 480 U.S. 149

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[6] At present, 34 of the 58 departments originally subject to the 1974 decree have been released from its terms because the percentage of minorities in those departments became commensurate with the percentage of minorities in the respective communities since the decree was entered. Pet. App. 5a.

[7] At the time this action was filed, 23.6% of the Department's firefighters were minorities, a figure that exceeded the percentage of minorities in the general population of Boston when the decree was filed in 1974. Pet. App. 24a.

(1987); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986). The 1974 finding of unlawful discrimination provided the predicate for remedial action (Pet. App. 26a), and the decree was narrowly tailored since "[n]o whites have been discharged or demoted under the terms of the decree" and "the plan is a temporary measure * * * not intended to maintain racial balance." *Id.* at 29a, quoting *United Steelworkers* v. *Weber*, 443 U.S. 193, 208 (1979).[8]

Petitioners filed a motion for reconsideration. Pet. App. 18a. Relying for the first time on data from the 1980 census, petitioners argued that because Massachusetts law requires firefighters to be at least 19 years old, the district court should have compared the percentage of minority firefighters in the Department (23.6%) with the percentage of minorities in the Boston population over the age of 18 (23.6%) according to that census. Under that measure, petitioners argued, there was no disparity justifying continued imposition of the race-conscious remedial decree. Pet. App. 13a-14a, 18a-19a.

The district court denied petitioners' motion for reconsideration. The court noted that 1990 census data, the most current statistical data available, showed that minorities comprise 29.72% of Boston's population who were 18 years old or older. Using the most current statistics available, the district court

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[8] The court also concluded that "[the] dispute among the parties as to whether the examination is valid is not material to this case * * * [because the] order does not expire merely because a validated examination is given. No department can be exempted until it reaches parity with the minority population." Pet. App. 28a.

concluded that the Department had failed to meet the requirements of the decree. Pet. App. 19a.

3. The court of appeals affirmed. Pet. App. 1a-15a. It agreed that the requirements of the 1974 remedial decree had not been met, and therefore refused to exempt the Department from its terms. *Id.* at 8a-10a, 14a-15a.

First, the court rejected petitioners' argument that the relevant reference for determining whether parity had been achieved was the number of minorities in Boston's population when the decree was entered in 1974. That argument "tortures the language of the decree, disregards the parties' consistent practice while operating under the decree, and defies common sense." Pet. App. 8a. The language of the decree is naturally read to refer to current population statistics. Moreover, since the decree was entered, the determination whether fire departments should be exempted from its terms had "universally been guided by reference to contemporaneous population statistics." *Id.* at 9a.

The court also held that the district court did not abuse its discretion in denying petitioners' motion for reconsideration based on a belated claim that the 1980 census figures demonstrate that parity had been achieved. Pet. App. 13a-15a. The 1980 census figures upon which petitioners relied in their motion for reconsideration were "available to them all along," and petitioners "offered no viable excuse" for their failure to cite those statistics earlier. *Id.* at 14a-15a. The court of appeals also noted that petitioners' claim that the 1980 figures demonstrate that parity had been achieved was without merit. *Ibid.* Because state law requires applicants to be at least 19 years of age to qualify for appointment as a firefighter, "[t]he most

pertinent 'labor pool' information that can be gleaned from the 1980 census figures is the head count of black and Spanish-surnamed individuals who were ten years of age, or older, in 1980," since those are the minorities who in 1989 would have been old enough to apply for a position in the Department. *Ibid.* Those figures did not establish, however, that the decree's goal of parity had been achieved.[9]

The court of appeals also rejected petitioners' challenge to the lawfulness of the district court's 1974 remedial decree. The court of appeals first noted that it had determined the decree to be constitutionally permissible in 1974. See *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d at 1027. Applying the strict scrutiny mandated by this Court's recent decisions, the court of appeals reaffirmed its earlier conclusion that the decree was narrowly tailored to remedy prior unlawful discrimination. Pet. App. 11a-13a. A number of factors—including the fact that the decree gives a preference only to qualified candidates, does not require the appointment of minority candidates, does not override statutory preferences mandated by state law, does not disturb the legitimate expectations of white applicants, and is limited in duration—indicate that the decree is sufficiently tailored. *Id.* at 12a-13a.[10]

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[9] According to the 1980 census, 26.64% of Boston's population were minorities who were also eligible by age to be firefighters in 1989, C.A. App. 272, a figure that exceeded the percentage of minorities in the Department. Pet. App. 15a, 18a.

[10] The court of appeals also agreed with the district court's conclusion that petitioners' claim that the Department had

ARGUMENT

1. Petitioners contend (Pet. 6-11) that the court of appeals erred in concluding that the Boston Fire Department has not satisfied the objectives of the remedial decree. According to petitioners, work force parity within the contemplation of the decree has been achieved.

a. Petitioners first argue (Pet. 6, 10) that the decree should be interpreted to require only that the percentage of minorities in the Department equal the percentage of minorities in the Boston population when the decree was entered in 1974. The court of appeals correctly concluded that petitioners' interpretation of the decree is without merit.

As the court of appeals explained, the "natura[l] read[ing]" of the decree's language as well as the "immutable, decade-old pattern of past practice" of the parties establish that parity is to be measured in terms of "contemporaneous population figures." Pet. App. 8a, 9a. In contrast, petitioners have "presented no direct evidence that the purpose of the 1974 decree was to exempt [the Department when it] reache[s] parity with the * * * 1974 population

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developed an entry-level examination having no adverse impact on minorities was beside the point. Pet. App. 10a. The court explained, "[e]ven a cursory reading [of the decree] makes it crystal clear that validated examinations are not an end in themselves," but a means of achieving the decree's goal of eliminating the effects of past discrimination. *Ibid.* Accordingly, "[e]ven if the examination was non-discriminatory, as [petitioners] alleged, the paucity of minority representation in the Department * * * negat[es] any argument that the purposes of the decree ha[ve] been achieved." *Id.* at 10a n.3.

statistics." *Id.* at 24a.[11] Accordingly, the court of appeals correctly rejected petitioners' fact-specific claim that compliance with the decree should be measured by reference to 1974 population statistics.

b. Petitioners also contend (Pet. 7-8) that work force parity has been achieved within the meaning of the decree because the percentage of minorities in the Department in 1989 (23.6%) was equal to the percentage of minorities over the age of 18 in the Boston population as of 1980 (23.6%). The court of appeals correctly rejected that fact-bound claim as well.

Census data reflecting the percentage of minorities in Boston over the age of 18 in 1980 at best would parallel the percentage of minorities in 1989, nine years later, who were at least 27 years old. As the court of appeals explained, because state law requires firefighters to be at least 19 years of age (see Mass. Gen. Laws Ann. ch. 31 § 58 (West 1983 & Supp. 1992)), "[t]he most pertinent 'labor pool' information that can be gleaned from the 1980 census figures" is the percentage of minorities who were ten years of age or older in 1980—a number that would give some rough indication of the number of black and Spanish-surnamed individuals who in 1989 were old enough to be considered for a firefighter position. Pet. App. 14a. Under that analysis, the percentage of eligible minorities in 1989 was 26.64%, which was roughly 3% greater than the percentage of minorities in the Department. *Ibid.*; C.A. App. 272. The court of appeals thus ruled

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[11] Moreover, reliance on outdated 20-year-old census data makes little sense, since current statistics are available and a comparison of 1989 work force statistics with 1974 population statistics would not indicate whether the effects of the Department's prior unlawful discrimination had been cured. Pet. App. 9a-10a.

that, even under the 1980 census figures that were the basis for petitioners' belated argument in their motion for reconsideration, the Department had failed to meet the decree's goal of work force parity.[12]

At bottom, petitioners' quarrel is with the court of appeals' interpretation of a remedial decree that is unique to this case. Petitioners cite no cases raising similar issues, much less any that are in conflict with the decision below, and further review is accordingly unwarranted.

2. Petitioners contend (Pet. 10, 12-15) that the decree unlawfully deprived them of employment on the basis of race. Specifically, petitioners claim that the decree is not narrowly tailored to remedy identified past discrimination, as required by this Court's decisions. See *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989); *United States* v. *Paradise*, 480

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[12] Petitioners also argue (Pet. 10-11, 13-15) that the court of appeals erred in refusing to exempt the Department from the decree because its current entry-level examination has no adverse impact. Because the decree mandates that the prior discrimination be remedied by affording a hiring preference to minorities, the court of appeals concluded that the use of a bias-free examination was not sufficient to require dissolution of the decree. Pet. App. 10a & n.3.

Moreover, it is a disputed issue of fact whether the examination at issue is valid. The United States argued in the district court that the examination had not been properly validated. See C.A. App. 83-86. That did not pose a barrier to granting summary judgment for respondents, however, because the courts below concluded that petitioners' claims were without merit even if they were correct as to the validity of the examination. Pet. App. 10a n.3. In contrast, petitioners plainly were not entitled to summary judgment based on the asserted validity of the examination, since that was a disputed issue of fact.

U.S. 149 (1987); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

The court of appeals agreed, however, that strict scrutiny is necessary in these circumstances. Pet. App. 6a. Under that analysis, a state or local government may not afford race-conscious relief unless it is supported by a compelling state interest and is narrowly tailored to further that interest. *Ibid.* Petitioners' claim therefore reduces to a dispute over the application of settled legal analysis to the facts of this case.

The court of appeals rejected petitioners' claim that the Department no longer had any basis for adhering to the decree because "tremendous strides" (Pet. 14) have been taken—particularly the development of an unbiased examination—since the decree was entered in 1974. In light of the prior finding of identified discrimination, the court of appeals correctly determined that the Department had a compelling state interest in taking action to remedy its effects. See *Croson*, 488 U.S. at 498-505; *United States* v. *Paradise*, 480 U.S. at 167 (plurality opinion).[13]

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[13] Petitioners also argue (Pet. 14) that because the Department has "made tremendous strides in remedying the past effects of any discrimination that may have occurred prior to 1974, there is no 'strong' or 'firm' basis in the evidence of prior discrimination." As the court of appeals noted, however, petitioners did "not argue that the original finding of discrimination was flawed." Pet. App. 7a. Petitioners cannot credibly claim that the Department lacked a compelling interest in complying with a remedial decree imposed on it after a trial on the merits, at which it was found to have unlawfully discriminated against minorities on the basis of their race.

In determining that the decree was narrowly tailored to remedy identified past discrimination, the court of appeals first relied (Pet. App. 11a) on its 1974 conclusion that the decree was "carefully limited in extent and duration," and went "no further than to eliminate the lingering effects" of the past discrimination. *Boston Chapter, NAACP, Inc.* v. *Beecher*, 504 F.2d at 1027. The court of appeals went on to analyze (Pet. App. 11a-13a) factors identified by this Court as relevant to whether a remedy is sufficiently narrowly tailored, and concluded that its 1974 conclusion was correct. See *United States* v. *Paradise*, 480 U.S. at 171 (plurality opinion). In particular, the court concluded that the decree gave an advantage only to qualified minorities, and did not require the hiring of anyone. Moreover, the decree maintained Massachusetts' statutory hiring preference for veterans, the children of disabled firefighters, and others. The court of appeals noted that the decree did not upset any legitimate expectation of being hired on the part of petitioners. "The record shows that, when [petitioners] sought appointment to the Department, there were many white candidates with statutory preferences and perfect test scores, and few firefighters' vacancies." Pet. App. 13a. Thus, the court of appeals concluded that the race-conscious hiring practices mandated by the decree passed strict scrutiny "with flying colors." *Id.* at 12a.

Petitioners' disagreement with the court of appeals is based on that court's application of strict scrutiny analysis to the facts of this case. Petitioners cite no authority mandating a different analysis, and do not claim that the decision below conflicts with the deci-

sion of any other court of appeals.[14] This Court's review is therefore unwarranted.

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[14] The *en banc* Seventh Circuit currently has pending before it two consolidated cases presenting challenges to race-conscious promotion practices (specifically a 25% minority promotion goal for the engineer rank) of the Chicago Fire Department, and to the promotion to captain rank of two minority firefighters who failed to reach the cut-off score on a promotion examination. *Billish* v. *City of Chicago and Chicago Firefighters Union Local No. 2* v. *Daley*, Nos. 90-1650 and 90-2182. The defendants in those cases claim that a consent decree between the City of Chicago and the United States (in which the City did not admit any violation of Title VII) required the practices at issue, and that the promotion of the two firefighters with test scores below the cut-off was necessary to avoid a prospective violation of Title VII. The cases are on appeal from the district court's grant of summary judgment for the defendants. The United States filed a brief in those cases as *amicus curiae*, arguing that strict scrutiny applied; that the consent decree did not require the practices at issue and did not shield the City's actions from challenge; and that material issues of fact remained concerning whether the Department's race-conscious practices were sufficiently narrowly tailored. Inasmuch as the Seventh Circuit cases concern interpretation of a consent decree rather than a remedial decree, and promotion practices rather than hiring practices, that litigation presents issues distinct from those in the present case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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